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IN THE

Supreme Court of the United States

October Term, 1966

No. ~~1362~~ 135

PAUL R. JONES,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Paul R. Jones, hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, which affirmed your petitioner's conviction for perjury (in an affidavit) after jury trial in the United States District Court for the Southern District of New York.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, which has not yet been reported, is annexed hereto as Appendix A. There was no opinion on its denial of petition for rehearing. There was no opinion in the District Court.

Jurisdiction

The order sought to be reviewed was made and entered on March 14, 1967. (It appears only in the annexed opinion.) An order denying a timely motion for rehearing was made and entered on April 6, 1967. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S. Code § 1254(1).

Questions Presented

1. Whether there is any law of the United States which authorizes an oath to be administered by a state notary public for an affidavit used on a motion in a federal criminal case, so as to bring such an affidavit (if perjurious) within the federal perjury statute?

2. Whether the testimony of a person before a federal grand jury given under the compulsion of a subpoena, when he is a target of the investigation, may later be used as evidence against him without violating his Fifth Amendment privilege against self-incrimination, especially when he is not advised that he is a target of the investigation?

3. Whether the constitutional right to a speedy trial under the Fifth and Sixth Amendments to the United States Constitution was denied to petitioner when the federal prosecutor marked his case off the calendar when petitioner's counsel was not present, without petitioner's consent, without petitioner understanding the effect thereof or being advised of his right to a speedy trial, and when the case is not tried for some three years, especially when in the interim petitioner is (incorrectly) advised by federal authorities that his case has been dismissed?

4. Whether, under Rule 8(b) of the Federal Rules of Criminal Procedure, an indictment may contain one count charging solely one perjury committed by one defendant, and another count charging solely another perjury com-

mitted by the other defendant at a different time, without any allegation that either defendant participated in the other's perjury?

5. When a witness (petitioner) executes an affidavit knowing it is to be used in support of a convict's motion for a new trial, after discussing said affidavit with the convict and the convict's lawyer, and the convict several weeks thereafter makes his own affidavit for the same purpose while in jail, and each is later separately indicted in a separate count in the same indictment for perjury solely in his respective affidavit—without any charge of conspiracy, joint action, or aiding and abetting—, and the convict does not testify at the trial,

(a) May the contents of the convict's affidavit be considered in evidence against the witness, merely upon a jury finding that the witness furnished his affidavit as part of a common agreement to secure a new trial for the convict by motion—without the jury being required to find that such agreement, its objective, or the means by which it was to be executed were illegal,—all in the absence of any evidence to show that the witness had any knowledge of the contents of the convict's later affidavit or reason to know what such affidavit might contain?

(b) Was the convict's later testimony, given voluntarily to a grand jury investigating possible perjury (after the witness had already testified before it), properly submitted to the trial jury under an instruction that it was admissible only as to the convict, that it was admissible "similarly" to the convict's affidavit, and that the convict's affidavit was admissible against the witness if the witness had given his own affidavit as part of the agreement to obtain a new trial?

(c) Does such use of the convict's affidavit or grand jury testimony violate the witness' right to confront and

cross-examine his accuser under the Fifth and Sixth Amendments?

(d) Should the motion for severance under Rule 14 have been granted?

6. Whether there was sufficient evidence upon which to affirm the verdict of guilt of perjury, when the only evidence of petitioner's wilfulness was the convict's said affidavit, and the convict's said grand jury testimony?

7. Whether a federal indictment sufficiently informed the accused of the nature and cause of the accusation against him, as required by the Sixth Amendment, when his alleged perjury allegedly lay in swearing that an event took place "At the last moment and just before the government rested its case", and the event occurred after the government rested its case the first time, but before it had rested its case the second time, the indictment being silent as to which resting the accused meant in his affidavit?

Constitutional Provisions, Statutes and Rules Involved

Since these are lengthy, their pertinent text is set forth in Appendix B hereto. Their citation is as follows:

United States Constitution: Article I, §§ 1, 7 and 8; Fifth and Sixth Amendments.

Statutes: 18 U.S. Code § 1621, 62 Stat. 73, 78 Stat. 995.

Act of August 15, 1876, c. 304, 19 Stat. 206 [U.S. Comp. St. 1091, p. 662].

Act of June 25, 1948, c. 646, § 39, 62 Stat. 869, 992, 994.

5 U.S. Code § 92, 29 Stat. 184.

5 U.S. Code § 92(a), 44 Stat. 830.

18 U.S. Code § 3772, 63 Stat. 98.

Federal Rules of Criminal Procedure: Rules 8(b), 14, 33, and 47.

STATEMENT OF THE CASE

Leo B. Mittelman was convicted in 1960 in the Southern District of New York of mail fraud and conspiracy.* During that trial, the Government rested twice—on both May 2, 1960 (GA 23a)** and May 12, 1960 (JA 54).***

On April 2, 1962, at Mittelman's request, petitioner made an affidavit at the office of Mittelman's attorney, being advised that Mittelman intended to use it in connection with a motion for a new trial. It was sworn to before a state notary public; it did not bear a notarial seal. Petitioner's six-page affidavit related detailed alleged falsities in testimony of two major witnesses at Mittelman's trial, to which petitioner had been subpoenaed to appear by the government, remaining in New York for many weeks. He then related (¶ 4) that "At the last moment and just before the government rested its case, I was advised that I would not be used by the government as a witness and it was suggested that I leave town." (App. A, p. 3a).

In the next paragraph (5), petitioner related that "The government told me about 5:00 o'clock in the evening that it was not going to use me", that he left New York that night on a three-week trip to Texas, during which he could not have been located (App. A, p. 4a).

Some six weeks after petitioner executed his affidavit, Mittelman executed his own affidavit while in a federal jail (GA 45a-7a). He recited that he had met with petitioner on several occasions during the presentation of the prosecution's case, and that "Before I could make up my mind

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* *United States* v. *Crosby, et al.*, 294 F. 2d 928 (2d Cir. 1961), cert. den. sub. nom. *Mittelman* v. *United States*, 368 U.S. 984 (1962).

** Such references are to the Appendix for the United States below.

*** Such references are to Appellants' Joint Appendix below.

whether to issue a subpoena [for petitioner], or depend on his being called by the prosecutor, he was suddenly excused just before the defense was to begin, and he was not to be located" (App. A, p. 5a).

Petitioner and Mittelman were both later indicted for perjury in one indictment. The first count thereof charged petitioner with perjury in his April 2, 1962 affidavit, in that petitioner had met with Mittelman on May 4, 1960, after the government had rested its case (App. A, p. 4a(9)). The second count charged Mittelman with perjury in his May 15, 1962 affidavit, in that he had met with petitioner on the same May 4, 1960 date (App. A, p. 5a(11)). For purposes of this proceeding, we do not dispute the sufficiency of the evidence showing that a meeting between petitioner and Mittelman occurred on May 4, 1960 at the Royalton Hotel in New York City.

The Grand Jury's Investigation Prior to Its Indictment

Petitioner was subpoenaed to appear before the grand jury on August 1, 1962 (SM 337,* JA 30). He had not consulted an attorney in regard to his appearance, and was not advised of right to counsel. He was not advised that he was a target of the investigation, nor of its subject matter (JA 30-1). He explained that he had made three trips to New York during the course of the Mittelman trial (JA 35). The meeting with Mittelman at the Royalton, he testified, occurred during his second trip (JA 34, 46), when he believed the government was still presenting its case (JA 44, 47), since he was still here at government expense (JA 43, 47). No evidence was introduced by the government to show that he was not in New York at government expense on May 4, 1960, the date of the Royalton meeting.

He explained that the fourth paragraph of his affidavit related to his second trip to New York, that he was told

* Such references are to the Stenographer's Minutes of the trial.

by the prosecutor he could leave town after the second trip and was excused, but not released, from the subpoena (JA 37, 49). It was only after his third trip to New York—made when the defense had begun its case (JA 32)—, that the government told him he was released from subpeona and that he took his trip to Texas, these being the events related in the fifth paragraph of his affidavit (JA 49-50, 36-7).

Petitioner testified that all he had been asked for by Mittelman and his attorney was an affidavit that two prosecution witnesses had lied, and that when he left New York the last time, it would have been impossible to reach him; there was no discussion about mentioning the Royalton meeting in his affidavit; there was little discussion (JA 38). Petitioner did mention to Mittelman's attorney that the defense could have called him as a witness if they wanted to but that they had decided not to; he did not go into a discussion with Mittelman's attorney as to whether his affidavit was misleading (JA 40).

Some two weeks later, Mittelman appeared before the grand jury at his own request (JA 10). He was advised that he was a subject of the investigation (SM 245). He testified that the Royalton meeting occurred just after the government had rested its case (JA 15, 16), that at several meetings petitioner had inquired "the status of the case" (JA 26). Mittelman testified that petitioner told him he had been excused as a government witness just before the government rested its case (JA 19). Mittelman testified that just prior to the execution of petitioner's affidavit, they had discussed the Royalton conference held the night before the defense case had begun (JA 17). He testified that his attorney had gone over the facts very carefully with petitioner, that petitioner came back the next day to sign the affidavit (JA 27), and that he had disagreed with petitioner as to the chronology set forth in petitioner's affidavit, on whether petitioner had left immediately, but that petitioner was insistent (JA 18-19, 28).

The Trial

At the trial, petitioner several times renewed his pre-trial severance motion (JA 8-9, 29). It was denied.

Mittelman's grand jury testimony and affidavit were read in evidence. Petitioner's grand jury testimony was also read in evidence.

The trial court instructed the jury that "the government contends that Mr. Mittelman and Mr. Jones submitted affidavits as part of a mutual understanding, plan and agreement to support a motion for a new trial * * *." (GA 99a). This was excepted to (JA 56). The trial court went on to charge as follows (GA 115a-116a)—also excepted to (JA 56):

> "I already have instructed you that the Grand Jury testimony of each defendant was received into evidence only as to the defendant whose testimony it was and not as to the other defendant. But to be sure, I repeat: The Grand Jury testimony of Mittelman is received only as to Mittelman and not as against Jones and, similarly, the Grand Jury testimony of Jones is received only as to Jones and not as against Mittelman. You are not to consider the Grand Jury testimony of Mittelman in determining the guilt or innocence of Jones and you are not to consider the Grand Jury testimony of Jones in determining the guilt or innocence of Mittelman.
>
> "Similarly, Mittelman's affidavit is not admissible as to Jones and Jones' affidavit is not admissible as to Mittelman unless you first find that the government has established Jones' connection with Mittelman's affidavit, and Mittelman's connection with Jones' affidavit.
>
> "By this I mean the following: If you find that Mittelman, either alone or through his duly authorized attorney, knew about, secured and procured Jones' affidavit and knew of the substance of the contents of Jones' affidavit and submitted Jones' affidavit in support of Mittleman's application for a new trial, then you may decide that Mittelman is

bound by Jones' affidavit and the connection would have been established if you so find.

"Similarly, if Jones knew at the time he prepared and signed and swore to his affidavit, if he did swear to his affidavit, that he was submitting this affidavit for the purpose of assisting Mittelman in obtaining a new trial, and if you find or infer, an inference being evidence also, that Jones knew the reason why and the purpose for his affidavit, and if you infer and so find that Jones discussed with Mittelman or with Mittelman's duly authorized attorney his affidavit, as part and parcel of a common agreement or undertaking to secure a new trial by means of a motion for Mittelman, then you may consider, if you so find, Jones' [*sic*] affidavit with respect to Mittelman [*sic*]."

Neither defendant took the stand (both had criminal records).

Defendants were convicted, petitioner being sentenced to eighteen months.

The purported basis for federal jurisdiction in the court of first instance is 18 U. S. Code § 3231, 62 Stat. 826 giving the district court jurisdiction to try offenses against the United States.

Proceedings in the Court of Appeals

The Second Circuit affirmed the convictions on March 14, 1967. Both a petition for rehearing and a supplemental petition for rehearing on behalf of petitioner were timely filed on or before March 29, 1967. In support of the Supplemental Rehearing Petition, petitioner alleged, in a supporting affidavit, that when he appeared in the District Court without his counsel, the prosecutor announced that he was marking the case off the calendar. Petitioner further alleged that at that time he was not advised by anyone that he had a constitutional right to a speedy trial, that he did not understand the effect of marking

the case off the calendar, nor could he recall his ever giving any consent to the case being marked off the calendar. About a year and a half after the case had been marked off the calendar, petitioner alleged, the Internal Revenue authorities advised him that the case against him had been dismissed, and there was therefore no reason for him to consider what could be done to terminate the case. He claimed, *inter alia*, that he had been denied his constitutional right to a speedy trial.

POINT I

This Court should settle an important question of federal law which has not been settled by it: whether there is any law of the United States, authorizing an oath to be administered by a state notary public for an affidavit in a federal criminal case, so as to bring such a perjurious affidavit within the federal perjury statute.

In petitioner's Supplemental Petition for Rehearing, which was denied by the Court of Appeals below, he contended that no law of the United States authorized an oath to be administered to him by a state notary public, and that he could not have committed the crime of perjury by so swearing to an allegedly perjurious affidavit, since under 18 U.S. Code § 1621 wilful false swearing does not constitute perjury unless done "in any case in which a law of the United States authorizes an oath to be administered". The Supplemental Petition for Rehearing was denied. Thus, the Court of Appeals decided this fundamental question of federal law, which indeed goes to the roots of the trial court's very jurisdiction. We believe that this question should be settled by this Court.

A. No law of the United States authorized an oath to be administered for an affidavit to be used on the criminal side of the district court.

Though the Act of August 15, 1876, c. 304, 19 Stat. 206 [U.S. Comp. St. 1091, p. 662] once gave state notaries public the same powers as the then Commissioners of the United States Circuit Court, this Act was repealed by the Act of June 25, 1948, c. 646, § 39, 62 Stat. 869, 992, 994.

While 5 U. S. Code § 92, 29 Stat. 184 does purport to provide for the taking of oaths in certain cases before state notaries public, this Court held in *United States* v. *Curtis*, 107 U.S. 671, 674 (1882) that it was of no effect to give any powers to any state notary public. Moreover, § 92 provides that an oath taken before a state notary public shall have force and effect "when certified under the hand and official seal of such notary"—but there was no seal, official or otherwise, on petitioner's affidavit. Thus, 5 U. S. Code § 92 is in any event inapplicable.

The law apparently relied upon by the Government below was 5 U. S. Code § 92(a), 44 Stat. 830. However, 92(a) is nothing more than a reference to other laws of the United States which authorize or require an oath to be administered, for it merely provides that state notaries public may administer an oath "In all cases in which, under the laws of the United States, oaths are authorized or required to be administered * * *." § 92(a) does not itself authorize the administration of an oath.

We have been unable to find any statute authorizing the administration of the oath here.

The question then arises, do the Federal Rules of Criminal Procedure authorize an oath to be administered on a motion for a new trial—and if so, are the Federal Rules "a law of the United States" within the meaning of 18 U. S. Code § 1621? We submit that both questions must be answered in the negative.

B. The Federal Rules of Criminal Procedure do not authorize the administration of an oath for an affidavit.

The Second Circuit noted in the case of *Perl* v. *United States,* 210 F. 2d 457, 458 (2nd Cir. 1954) that Rule 6(c) of the Federal Rules of Criminal Procedure specifically authorized the administration of an oath before a grand jury. But there is nothing in the Rules of Criminal Procedure specifically authorizing the administration of an oath in connection with a motion for a new trial. While Rule 33 provides for the making of a motion for a new trial, and while Rule 47 provides that an application to the Court for an order shall be made by motion, which "may be supported by affidavit", there is still no provision in the Rules (or elsewhere) which specifically authorizes the administration of the oath for such affidavit. In other words, while the Federal Rules provide that an affidavit may be used, there simply is no provision authorizing the oath to be administered—and 18 U. S. Code § 1621 requires that such a federal law exist before the crime of perjury can be committed. *United States* v. *Curtis, supra,* 107 U.S. at 673.

Moreover, in *Curtis,* this Court expressly distinguished its prior decision in *United States* v. *Bailey,* 9 Pet. 238 (U.S. 1835) a case involving "false swearing", where the penal statute did not require an oath authorized by law. It noted [107 U.S. at 675] that in such a case, a regulation of the Treasury was sufficient to authorize the notary to act. And in *Bailey,* this Court had noted that an indictment for perjury cannot lie in this country where the affidavit was not "authorized by any statute, but was solely dependent upon the practice and usage of the courts * * * "[1] (9 Pet. at 256)—as is the oath involved here.

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[1] All that this Court may prescribe in the Rules of Criminal Procedure are "rules of practice and procedure". 18 U.S.C. § 3772, 63 Stat. 98.

This Court in *Bailey* noted that absent any statute authorizing an oath, a defendant could be prosecuted in England for the common law equivalent of obstruction of justice. But the indictment at bar charged only perjury, not obstruction.

C. Even if the Federal Rules did authorize the administration of an oath, they do not constitute a law of the United States.

This Court, not the Congress, makes the Federal Rules. But the Constitution gives Congress, not this Court, the power "to make all Laws" (Article I, § 8), vesting all "legislative Powers in" Congress (Article I, § 1). And even assuming that the Rules somehow became legislation, every piece of legislation "shall, before it become a Law, be presented to the President of the United States" [United States Constitution, Article I, § 7]—but the Federal Rules were not so presented. Thus, they cannot be a law of the United States. Cf. *Statement of Mr. Justice Black and Mr. Justice Douglas,* 374 U.S. 865, 866 (1963).

Mr. Justice Frankfurter, too, noted that the Federal Rules of Civil Procedure are "Plainly * * * not acts of Congress and can not be treated as such." *Sibbach* v. *Wilson & Co.,* 312 U.S. 1, 18 (1941) (dissenting, but majority did not question this proposition).[2]

Indeed, Congress cannot delegate the law making power to this Court. Long ago, Mr. Chief Justice Marshall ruled that: "It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative." *Wayman* v. *Southard,* 10 Wheat. 1, 42 (U.S. 1825).

Thus, the Federal Rules can not be "a law".

* * *

The importance of this question cannot be overstressed. Not only does it involve the basic question of whether there can be a federal prosecution for perjury in any affidavit submitted on the criminal side of the district court—it

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[2] See, also, in criticism of the Second Circuit's decision in *Perl, supra* (which decision failed to consider this problem), Wise, "Congressional Abolition of Perjury Before Federal Grand Juries", 7 Univ. of Florida Law Rev. 272 (1954).

reaches as well to affidavits used on the civil side of the district court, inasmuch as there is no specific provision in the Federal Rules of Civil Procedure (or elsewhere) authorizing the administration of an oath. Not only is a decision on this issue vital to federal and state relationships, since most states—as does New York [8]—make the false swearing to an oath before a state notary public a state criminal offense, but it is vitally important to the administration of federal justice to determine whether a federal crime is committed when a perjurious affidavit is sworn to before a state notary public and submitted to a federal court.

POINT II

This Court should settle another important question of federal law which has not been settled by it: whether the grand jury testimony of a subpoenaed prospective defendant may later be used in evidence against him, especially when he was not advised that he was a target of the investigation.

This Court recently ruled that evidence obtained by "a form of compulsion" could not be used against a defendant, in that such use violated the defendant's privilege against self-incrimination. *Garrity* v. *New Jersey*, 385 U.S. 493, 497 (1967). We submit that there is a serious federal constitutional question here: whether a subpoena is to be deemed a form of compulsion, preventing the later use of the testimony so obtained against the defendant.

The New York Court of Appeals has ruled that when "a prospective defendant" is subpoenaed before the grand

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[8] New York's Penal Law, § 1620, defines perjury as wilfully swearing falsely "on any occasion in which an oath is required by law or is necessary for the prosecution or defense of a private right or for the ends of public justice or may lawfully be adminstered * * *". It is readily apparent that a state prosecution for perjury lies in New York for a false affidavit used in a federal proceeding.

jury, "In such a case the subpoena is deemed to be *a form of compulsion,* and the testimony thus compelled may not be used against the defendant * * *" in the light of the state privilege against self-incrimination. *People* v. *Laino,* 10 N.Y. 2d 161, 170-1, 218 N.Y.S. 2d 647, 655, 176 N.E. 2d 571 577 (1961). (Emphasis supplied.) If so, then clearly petitioner's grand jury testimony could not constitutionally have been used against him. That such testimony could not be so used seems implicit, as well, in this Court's opinion in *Lawn* v. *United States,* 355 U.S. 339 (1958).

The United States Court of Appeals for the District of Columbia Circuit has ruled that "there is a serious question whether our jurisprudence, fortified by constitutional declaration, permits * * *" the procedure of subpoenaing a prospective defendant. *Powell* v. *United States,* 226 F. 2d 269, 274 (D.C. Cir. 1955). Some years later, in *Jones* v. *United States,* 342 F. 2d 863 (D.C. Cir. 1964), that Court split on this issue, ruling 5-4 that an indictment could be based on such evidence, over vigorous dissents (*id.* at 867-8)—but the majority noted that it expressed no opinion on the law if grand jury testimony so obtained were later used at defendant's trial, since the testimony there "was not so used in this case" (*Id.* at 881). In the case at bar, it was so used.

The decision below, denying our Supplemental Petition for Rehearing which raised this point, thus decided an important federal constitutional question in a way in conflict with an applicable decision of this Court (*Garrity, supra*), whose importance has been declared by another court of appeals, and which we submit should be settled by this Court.

Moreover, until now it had been accepted federal jurisprudence that it was fatal to an indictment to subpoena a person before the grand jury without advising him that he was a target. *United States* v. *Edgerton,* 80 Fed. 374 (D.C. Montana 1879. But your petitioner was not so advised.

POINT III

This Court should grant review to determine whether the federal procedure of marking cases off the calendar violates the constitutional right to a speedy trial, especially when defendant is later advised by federal agents that the case against him is dismissed.

Federal prosecutors often follow the practice of marking cases off the trial calendar. In the case at bar, petitioner alleged in his Supplemental Petition for Rehearing that this case was so marked off at a time when his counsel was not present, without his consent, without his understanding the effect thereof, and without his being advised that he had a right to a speedy trial. For almost three years, there was no activity in his case. Midway in this period Internal Revenue authorities advised petitioner that his case had been dismissed. (March 27, 1967 Affidavit of Paul R. Jones, submitted in support of Supplemental Petition for Rehearing below). The Court below nonetheless denied the Supplemental Petition for Rehearing, over petitioner's claim that he had been denied a speedy trial in violation of the Sixth Amendment and of due process under the Fifth Amendment.

We submit that it is in the public interest that this Court should promptly rule on the applicability of its decision in *Klopfer* v. *North Carolina*, — U.S. —, 87 S.Ct. 988 (1967) to the federal procedure of marking cases off the calendar, so similar under the facts alleged here to the North Carolina process constitutionally condemned in *Klopfer*.

POINT IV

In ruling that a perjury count solely against one defendant may be joined with another perjury count solely against the co-defendant, in an indictment in which neither defendant is alleged to have participated in the other's perjury by way of conspiracy, aiding and abetting, or otherwise, the Court below rendered a decision in conflict with the decisions of another court of appeals on the same matter, and in a way in conflict with an applicable decision of this Court.

The indictment at bar charged petitioner in the first count with swearing to a false affidavit on April 2, 1962 (App. A, p. 3a(8)). In the second count, it charged Mittelman with swearing to a false affidavit on May 15, 1962 (App. A, p. 4a(10)). It did not allege that petitioner participated in Mittelman's perjury, or that Mittelman participated in petitioner's perjury (App. A, p. 2a, n. 1). It was silent as to who had prepared the affidavits.[4] It did not allege that petitioner knew that an affidavit by Mittleman was to be filed with Mittleman's motion.[5] In short, it alleged completely separate acts of perjury committed separately by each defendant, linked not by any participation in act(s) or transaction(s) constituting the offense of perjury, but

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[4] The opinion below is thus somewhat inaccurate when it recites that "The indictment charged the preparation by Jones and Mittelman of false affidavits as to Jones' availability, to be filed with Mittelman's motion." (App. A, p. 6a). This inaccuracy was called to the attention of the Court below in petitioner's Petition for Rehearing (p. 2).

[5] See n. 4, *supra*.

instead solely by Mittelman's later use of petitioner's affidavit.[6]

The decision below upholding the joinder in such a case is in conflict with the Ninth Circuit, which has only recently reaffirmed its rule that "Where multiple defendants are involved, Rule 8(b) requires that *each* count of the indictment arise out of the 'same series of acts or transactions' in which all of the defendants 'have participated'." *Metheany* v. *United States,* 365 F. 2d 90, 94, n. 4 (9th Cir. 1966). (Emphasis the Court's). There was no allegation in the indictment that petitioner participated in Mittelman's false affidavit, sworn to more than six weeks after petitioner's own affidavit, at a time when Mittleman was in a federal jail. The decision below is thus in conflict with *Metheany.*

Similarly, the decision below is in conflict with this Court's decision in *McElroy* v. *United States,* 164 U.S. 76, 80 (1896). This Court there held that indictments may not be consolidated "in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried." Yet that is precisely what happened here; defendants were charged with entirely separate crimes, but tried together. Prejudice was bound to result. It did.

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[6] Rule 8(b), Fed. R. Crim. Proc. permits joinder of defendants if "they are alleged to have participated in the same act or transaction or in the same series of acts or transactions *constituting an offense or offenses.*" (Emphasis supplied.) But there was no allegation of either defendant having participated in the other's offense; the sole link alleged between the two offenses was Mittelman's later using petitioner's affidavit in support of Mittelman's motion. This, however, was not an allegation of participation by either defendant in any act or transaction of the other which constituted perjury; it is not mere participation in the same acts which permits joinder, but participation in acts or transactions which constitute an offense. Since no such participation was alleged, the joinder was clearly improper under the plain language of 8(b).

POINT V

The Trial Court instructed the jury that the affidavit (and similarly, the grand jury testimony) of petitioner's co-defendant was admissible against petitioner if petitioner's affidavit was submitted as part of a common agreement to secure a new trial. Since such an agreement is legal, and the jury was not required to first find anything illegal in the agreement's objective or means of execution, hearsay evidence was admitted against petitioner which would have been inadmissible even in a conspiracy case. The affirmance below poses a serious threat to the fair administration of justice in Federal cases. It is in conflict with decisions of this Court and other courts of appeals.

A. The decision below permits a wider scope of admissibility of evidence in prosecutions of defendants charged separately and independently in one indictment than if they were charged with conspiracy, joint action, or aiding and abetting. It thus presents dangers even greater than those in conspiracy prosecutions.

The Court below held that the acts and declarations of petitioner's co-defendant Mittelman were chargeable to petitioner since, said the Court, petitioner and Mittelman were "joint actors in furtherance of a common illegal plan", and the evidence against petitioner could have been admitted against him on separate trial (App. A. p. 7a). But the jury had never been required to find the existence of an illegal plan; the instructions governing admissibility (*supra,* pp. 8-9) did not require an *illegal* plan (or illegal objective or means) to be found, but merely required the finding of a "common agreement or undertaking to secure a new trial" for Mittelman by motion—and such a plan, far from being illegal, is authorized by Rule 33. The mere legal agreement, *per se,* was enough to permit the use of Mittelman's *ex parte* declarations against petitioner in determining whether petitioner's own affidavit had been perjurious.

The decision below thus gives prosecutors a stronger weapon than the conspiracy statute, in the absence of a conspiracy charge. Had a conspiracy been alleged here, Mittelman's declarations would not have been admissible against petitioner unless there was first established either a conspiracy to commit an illegal act or to commit a legal act by illegal means, plus petitioner's being a member of such conspiracy. But under the decision below, there need be only an agreement to commit a legal act by legal means to make a defendant's declarations admissible against a separately charged co-defendant—all in the absence of a charge of conspiracy, joint action [7] or of aiding and abetting. Moreover, there was simply no evidence that Mittelman's acts and declarations were in furtherance of a common illegal plan, of which petitioner might have had knowledge, either in Mittelman's affidavit or in his grand jury testimony. On the contrary, the evidence negated the possibility of any belief on petitioner's part, when he executed his affidavit, that Mittelman would later submit an affidavit stating, as it did (*supra*, pp. 5-6), that petitioner was unavailable when the defense began.[8]

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[7] Though petitioner was indicted solely for the commission of perjury by himself, the case went to the jury on the so-called government theory that defendants "submitted affidavits as part of a mutual understanding, plan and agreement to support a motion for a new trial * * *" (GA 99a), duly excepted to by petitioner (JA 56). Petitioner was thus convicted on a charge not made in the indictment, in violation of due process. *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948); *DeJonge* v. *Oregon*, 299 U.S. 353, 362 (1937).

[8] Mittelman had testified that, before petitioner signed the final version of his affidavit, Mittelman had discussed with petitioner that he had had a meeting with him at the Royalton the night before the defense began (JA 17). Petitioner testified that, at the time of the signing of the affidavit, he told Mittelman's attorney that the defense could have called him as a witness if they had wanted to (JA 40). Under either or both of these versions of the facts, there was simply no reason for petitioner to have assumed that Mittelman would later put in an affidavit negating petitioner's availability to the defense.

Nor was there any evidence independent of Mittelman's affidavit that Mittelman's affidavit was in furtherance of a common illegal plan attributable to petitioner. It was therefore inadmissible, for evidence cannot be admissible when the only foundation for its reception lies in the challenged evidence itself. The Second Circuit itself previously recognized this principal that evidence cannot pull itself into admissibility by its own bootstraps,[9] but did not here follow its own prior ruling.

The context in which these proceedings arose makes the decision below doubly dangerous. For the result of the Second Circuit's approval of the District Court's charge is that if a witness knowingly gives an affidavit for use on a motion, as part of an "agreement" to secure the motion's objective (which will be the case almost any time a witness gives an affidavit), all acts or declarations of the party in behalf of whom the affidavit is submitted may be admissible against the witness, though he be ignorant of them, and have no reason to have believed that they would occur —without any opportunity being afforded to the witness to cross-examine the party. We emphasize that this is not a *reductio ad absurdum*. It is the necessary result of the Second Circuit's approval of the District Court's charge.

This Court has "repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald* v. *United States*, 353 U.S. 391, 404 (1957). But the "serious threat to fairness in our administration of justice" posed by the tool of conspiracy prosecutions [Mr.

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[9] In *United States* v. *Annunziato*, 293 F. 2d 373, 378 (2nd Cir. 1961), cert. den., 368 U.S. 919 (1961), the Second Circuit ruled that a statement of a co-conspirator is admissible in the absence of a charge of conspiracy, when evidence, *"other than that whose admissibility is under challenge,* disclosed one." (Emphasis supplied.)

Justice Jackson, concurring in *Krulewitch* v. *United States*, 336 U.S. 440, 446 (1949)] is a nothing compared to the threat here. For here we have the spectacle of declarations clearly inadmissible even in a conspiracy case being admissible when individuals are separately and independently charged in the same indictment with separate and distinct offenses.[10]

B. The decision below denied petitioner his right to confront and cross-examine his separately and independently charged co-defendant.

Until the case at bar, apparently no federal court had ever held that in a case where the indictment alleges neither conspiracy, joint action, nor aiding and abetting, the acts and declarations of a co-defendant who does not take the witness stand may be considered against the other defendant. The decision below is in conflict with this Court's ruling, in *Pointer* v. *Texas*, 380 U.S. 400 (1965), that the Sixth Amendment's requirement of confrontation precludes admission in evidence of testimony previously given by an alleged co-participant in the crime, when the defendant has no opportunity to cross-examine the alleged co-participant. Since the criminal records of both defendants in the case at bar were known to the government, and neither defendant could have been expected to take the stand, the constitutional violation would seem aggravated.

While evidence of one actor against the other, in pre-*Pointer* days, might have been considered when defendants were charged jointly with the same crime, when such evi-

[10] If the decision below be good law, conspiracy prosecutions may soon be a thing of the past. Far better—from the prosecutor's view—to charge individuals in separate and independent counts within the same indictment and have a scope of admissibility of evidence greater that the present scope of admissibility in conspiracy cases. Far worse—from the viewpoint of justice.

dence was part of the *res gestae* [*St. Clair* v. *United States*, 154 U.S. 134, 149 (1894)], this Court there ruled that such evidence is not admissible unless "the necessary incidents of the litigated act" which "must stand in immediate casual [*sic*] relation to the act" (*id.* at 149-150)—tests which were not applied below, and which Mittelman's affidavit could not possibly meet. His affidavit was not shown to be part of the *res gestae* of petitioner's alleged perjury by any competent proof.

When the Second Circuit had in the past permitted admissibility of evidence as to a co-defendant's declarations [*United States* v. *Annunziato, supra*, p. 21; *United States* v. *Pugliese*, 153 F. 2d 497, 500 (2nd Cir. 1945)], in every such case the one testifying has been available for cross-examination. This rule of admissibility has now been widened to where it is more than merely an unwise rule of evidence; by effectively denying cross-examination and confrontation by one defendant of the other, it now constitutes an affront to due process and the Sixth Amendment. It is in conflict with *Pointer*, and *St. Clair* (especially as implicity modified by *Pointer*). This decision below should be reviewed (and reversed), unless the present minimum modicum of fairness in mass trials is to become defunct.

C. Even if defendants had been jointly indicted, the state of mind of one could not have been inferred from the things the other said or did.

In any event, under decisions of this Court and other Courts of Appeals, the rule permitting even limited use of a joint actor's declarations against his co-defendant is simply inapplicable to perjury cases and to those in which there is neither charge of conspiracy nor joint action. Thus, this Court has ruled that "* * * there can be no successful prosecution for false swearing" in the absence of proof of "the state of a man's mind [which] must be inferred from the things *he* says or does." *Communications*

Assn. v. *Douds,* 339 U.S. 382, 411 (1950) (emphasis supplied). We are unaware of any federal decision permitting proof of the state of a man's mind from the things another says or does.[11]

D. A severance should have been granted, in view of the trial court's failure to (1) carefully compartmentalize the proof as to each defendant, and (2) give a clear instruction as to the non-admissibility of Mittelman's grand jury testimony against petitioner. Petitioner was prejudiced by denial of the severance.

Not only was the Court of Appeals in error in affirming the conviction on the theory that defendants were "joint actors in furtherance of a common illegal plan"—but the denial of a severance was in conflict with decisions of this Court and of another Court of Appeals. Thus, even when there has been at one time a conspiracy charge in a case, it is proper to deny a motion for severance only when "the proof was carefully compartmentalized as to each petitioner." *Schaffer* v. *United States,* 362 U.S. 511, 515 (1960). But the rule below is that in the absence of a conspiracy, proof against one defendant may be considered against all, and that even what would be a post-conspiracy admission in a conspiracy case (*i.e.,* Mittelman's grand jury testimony) may be submitted to the jury without the clear warning as to its admissibility solely against the declarant,

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[11] The decision below is in conflict with that of the Eighth Circuit, which held that "It is fundamental that no man can confess for any one but himself." *Hale* v. *United States,* 25 F. 2d 430, 438 (8th Cir. 1928). There the court reversed the denial of a severance where appellant had been convicted of aiding and abetting in a murder and tried with his principal, ruling that the principal's confession could be considered only against the principal.

as required by this Court in *Delli Paoli* v. *United States*, 352 U.S. 232, 233 (1957).[12]

The Court below ruled that Mittelman's grand jury testimony, "even if considered by the jury against Jones in violation of the instructions,[13] was merely cumulative to the independent relevant and convincing documentary evidence" fixing the date of the Royalton meeting as May 4 (App. A, pp. 10a-11a). For purposes of this petition, we assume *arguendo* that this statement is correct, and that in fact May 4, 1962 was the date of the Royalton meeting. But in other crucial respects, not adverted to below, Mittelman's grand jury testimony was extremely damaging to petitioner, non-cumulative—and indeed the sole evidence.

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[12] In *Delli Paoli*, this Court upheld, by a narrow 5-4 margin, the admission in evidence of a confession of a co-defendant made after the termination of the alleged conspiracy, when the trial court "stated clearly that the confession was to be considered only in determining the guilt of the confessor and not that of other defendant" (352 U.S. at 233). In the case at bar, the trial court's instructions (quoted *supra* at pp 8-9) as to the admissibility of Mittelman's grand jury testimony against petitioner (given after any "conspiracy" must have ended) were far from clear; indeed, their confusion was an open invitation for the jury to consider Mittelman's grand jury testimony against petitioner. (This may be the explanation of the sentence in the opinion below indicating that the jury may have considered Mittelman's grand jury testimony against petitioner "in violation of the instructions". App. A., p. 10a.) For after the trial court stated that Mittelman's grand jury testimony was received only as to Mittelman, it stated that similarly, Mittelman's affidavit is not admissible as to petitioner unless there is first found petitioner's connection therewith—thus indicating that Mittelman's affidavit and his grand jury testimony were to be considered similarly and that both were potentially admissible against petitioner.

Clear prejudice resulted from the jury's consideration of Mittelman's grand jury testimony; we refer to the immediately succeeding text of this Petition.

[13] That its consideration was not in violation of the instructions, see n. 12, *supra*.

For petitioner, in his own grand jury testimony, had testified that the Royalton meeting occurred during his second trip to New York pursuant to government subpoena, and that it was his belief that the Government had not yet rested its case, since he was still here at government expense (JA 34, 43, 44, 46, 47). If this was in fact his belief —and the contrary was never shown—his affidavit was not false in failing to state that the May 4 meeting occurred after the Government had rested. But Mittelman testified that when petitioner was here, petitioner had repeatedly inquired the status of the case (JA 26). The jury could well have inferred from this testimony that petitioner well knew that the May 4 meeting occurred after the Government first rested.[14] Such an inference might have been reinforced by Mittelman's testimony that petitioner had told him that petitioner had been excused as a government witness just before the government rested its case (JA 19), whereas petitioner had testified that he was excused after his second trip to New York (JA 37), which he believed was while the government was still presenting his case. Absent Mittelman's testimony of petitioner's admission that he had been excused as a government witness just before the government rested its case, and his testimony that he had discussed the Royalton meeting with petitioner on the eve of petitioner's affidavit (JA 17), there was no proof whatsoever as to petitioner's state of mind when he executed his affidavit. Since Mittelman's grand jury testimony was then the *only* evidence as to petitioner's state of mind, the jury could not have convicted without considering this testimony.

Moreover, by Mittelman stating his disagreement with petitioner as to the chronology (JA 18-19, 28), he thrust the entire blame for any errors in both affidavits upon petitioner, while petitioner indicated that there had been no such discussion (JA 38).

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[14] Cf. the Court's charge to the jury: "* * * an inference being evidence * * *" (GA 116a).

Absent Mittelman's grand jury testimony, there was nothing to show that petitioner had done anything except to make a bona fide mistake that the Royalton meeting was during the prosecution's case. Mittelman's grand jury testimony, the only evidence of petitioner's state of mind, was thus severely prejudicial to petitioner—albeit cumulative to other evidence establishing the date of the Royalton meeting.

POINT VI

The ambiguous indictment failed to meet Sixth Amendment requirements, and the legal evidence in support of the indictment was clearly insufficient.

In paragraph 4 of petitioner's affidavit, he had alleged that it was suggested that he leave town "at the last moment and just before the government rested its case * * *". But the Government rested twice, on May 12, 1960 as well as May 2, 1960. Which was "the last moment"? Obviously, the second resting on May 12. Therefore, the existence of the May 4 Royalton meeting showed no perjury.

The indictment failed to allege which resting the affidavit referred to. It was inherently ambiguous, and thus did not meet Sixth Amendment requirements. In deciding otherwise, the Court below rendered a decision in conflict with that of the District of Columbia Circuit which affirmed [232 F. 2d 334 (D. C. Cir. 1955)] the District Court's decision in *United States* v. *Lattimore,* 127 F. Supp. 405 (D.D.C. 1955).

But in any event, the evidence was insufficient, not merely under the strict requirements of the perjury rule, but even under normal rules of evidence. The gist of the error below was the Court's concentration on proof of petitioner's attending a May 4, 1960 meeting with Mittel-

man at the Royalton. We concede that, for purposes of this proceeding here, the proof adequately showed the existence of the meeting at such time and place. Yet this does not establish petitioner's wilfulness in executing his affidavit.

The Court below approved the jury finding of wilfulness "from the manner and context in which they [the paragraphs of petitioner's affidavit] were used." It ruled that the jury was justified in its interpretation of petitioner's affidavit "since they were prepared and used in connection with Mittelman's affidavit containing the final sentence" of his paragraph 52 (App. A, p. 10a). However, the plain fact of the matter is that petitioner's affidavit was *not* prepared or used by petitioner in connection with Mittelman's affidavit. On the contrary, there is not even a hint anywheres in the record that petitioner had any idea whatsoever of what Mittelman would put in the 52nd paragraph of Mittelman's affidavit, executed more than six weeks after petitioner's affidavit, when Mittelman was in prison.[15] Yet the opinion below charges petitioner with such knowledge simply because he gave Mittelman an affidavit knowing it would be used in an attempt to secure a new trial. Petitioner's wilful intent, it finds, is established by Mittelman's later use and interpretation of petitioner's affidavit—of which petitioner had no knowledge.

We submit that this does not satisfy even the normal rules of evidence. Nor was wilfulness found on the basis of testimony of two witnesses, or of one witness with corroborating circumstantial evidence, or documentary evidence plus admissions of the accused; to satisfy the perjury rule. True, the existence of the May 4 Royalton meeting was adequately proved, but there was simply no proof of wilfulness at all on petitioner's part (*aliunde* the clearly

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[15] That petitioner could not possibly have expected Mittelman to swear as he did, see n. 8, *supra*, p. 20.

inadmissible Mittelman grand jury testimony). Wilfulness was affirmed solely on the basis of Mittelman's use and interpretation of petitioner's affidavit. Moreover, as we have shown above, it was error to permit the use of Mittelman's affidavit against petitioner.

Assuming for purposes of this Point that petitioner's grand jury testimony was property introduced into evidence against him, it showed that the Royalton meeting occurred during his second trip to New York, when he thought that the government had not rested its case because he was still being paid by the government. Was petitioner not being paid by the government at that time, surely the government would have so proved. Thus, petitioner's testimony is uncontradicted (save by the Mittelman grand jury testimony) that when the May 4 Royalton meeting occurred, he believed that this was during the prosecution case, not the defense. The fact that the government had actually rested its case by this time, then, was irrelevant, for the meeting of May 4th (the sole meeting relied on by the government in the indictment and at the trial) was believed by petitioner to have occurred *before* the government had rested its case. Thus, wilfulness as charged in the indictment was lacking.

So, too, there was no evidence to suggest that petitioner had any reason to believe that there was any importance to be attached to the sequence or timing of events recited in paragraphs 4 and 5 of his affidavit. There was no showing that petitioner knew of the diligence requirement in securing a new trial. Petitioner testified before the grand jury that he was merely asked to give an affidavit as to lies by two prosecution witnesses at Mittelman's trial, and that petitioner could not be reached after he left town the last time (JA 38). He believed both statements to be true. He made them. There was no showing that he wilfully lied.

CONCLUSION

This Court should grant certiorari, the judgment below should be reversed, and the indictment dismissed.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

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No. 298—September Term, 1966.

(Argued February 8, 1967 Decided March 14, 1967.)

Docket No. 30925

UNITED STATES OF AMERICA,

Appellee,

—v.—

PAUL R. JONES and LEO B. MITTELMAN,

Appellants.

Before:

MOORE, FRIENDLY and SMITH,

Circuit Judges.

Appeal by Paul R. Jones and Leo B. Mittelman from judgments of conviction of perjury and sentence thereon after jury trial in the United States District Court for the Southern District of New York, William B. Herlands, *Judge.*

Affirmed.

SMITH, *Circuit Judge*:

Paul R. Jones and Leo B. Mittelman were convicted after jury trial, each on one separate count of perjury in the United States District Court for the Southern District of New York, William B. Herlands, *Judge*, and they appeal. We find no error and affirm the judgments.

Appendix A

In 1960 Mittelman was convicted in the Southern District of New York of mail fraud and conspiracy to sell unregistered securities. The conviction was affirmed, *United States* v. *Crosby, et al.*, 294 F. 2d 928 (2d Cir. 1961), cert. denied sub nom. *Mittelman* v. *United States*, 368 U. S. 984 (1962). On May 15, 1962 Mittelman submitted a motion for a new trial on the ground of newly discovered evidence and government suppression of evidence favorable to the defense. Submitted with the motion were affidavits of Jones executed April 2, 1962 and Mittelman executed May 14, 1962. The convictions for perjury here under review were based on statements in those affidavits to the effect that newly discovered evidence existed in that Jones could testify that the government had knowingly used perjured testimony of witnesses Holland and Carroll and that Jones had not been available to reveal this to Mittelman from the time the government rested until months after the conclusion of the trial.[1]

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[1] The Indictment in the case at bar contained the following allegations:

> 1. From on or about the 15th day of February 1960, up to and including the 24th day of May 1960, in the United States District Court for the Southern District of New York, the trial of United States v. Francis Peter Crosby, et al., Docket Number C 157-56, was in progress. LEO B. MITTELMAN was one of the defendants on trial in the above case. The Government finished presenting its evidence and rested its case on or about the 2nd day of May 1960. On or about the 5th day of May 1960, the defense began presenting its evidence in the above case.
>
> 2. On or about the 17th day of June 1960, in the United States District Court for the Southern District of New York, a judgment of conviction was entered against LEO B. MITTELMAN for violating Title 18, United States Code, Sections 2 and 1341 (mail fraud), and Title 18, United States Code, Section 371 (conspiracy to sell unregistered securities in violation of Title 15, United States Code, Sections 77e(a)(1), (a)(2) and 77x). By the terms of the said judgment, the said LEO B. MITTELMAN

Appendix A

During the course of the trial in *United States* v. *Crosby*, witnesses Holland and Carroll had testified on behalf of the government in a manner unfavorable to Mittelman. Jones had been subpoenaed by the government as a possi-

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was sentenced to imprisonment for 5 years and to a succeeding 5-year probationary term.

* * *

6. On or about the 15th day of May 1962, the said LEO B. MITTELMAN filed and caused to be filed in the United States District Court for the Southern District of New York a motion for a new trial based, in part, on alleged newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure. It was necessary and material to the said motion that the said LEO B. MITTELMAN show that the alleged newly discovered evidence was in fact newly discovered since the trial and could not have been discovered previously in the exercise of due diligence. In support of the said motion there were submitted the affidavits of PAUL R. JONES dated April 2, 1962, and LEO B. MITTELMAN dated May 15, 1962, among others.

7. The allegations of paragraphs one through six herein are realleged for each of Counts 1 and 2 as though fully set forth therein.

COUNT ONE

The Grand Jury charges:

8. On or about the 2nd day of April 1962, in the Southern District of New York, PAUL R. JONES, the defendant herein, having duly taken an oath before a competent tribunal, officer and person, to wit, a notary public, in a case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose and certify truly, and that a written testimony, declaration, deposition and certificate by him subscribed is true, unlawfully, wilfully, knowingly and contrary to such oath did state and subscribe to material matter which he did not believe to be true, more particularly as follows:

"4. * * * I was in New York for many weeks during the trial waiting to testify. At the last moment and just before the government rested its case, I was advised that I would not be used by the government as a witness and it was suggested that I leave town.

ble government witness and had been in contact with Mittelman. The government rested its case in chief May 2, 1960 without calling Jones.

"5. The government told me about 5:00 o'clock in the evening that it was not going to use me. That same evening my wife and I packed and we left New York City in my automobile, and we started traveling. The first night we stayed in Maryland; from Maryland we went to Washington, D. C., where we stayed several days. Then we continued our travelling by automobile to North Carolina and from there to Texas. This travelling from New York City to Texas took some three weeks. During this period it would have been impossible for any one other than those whom I telephoned to locate me and needless to say, I did not telephone Mr. Mittleman or any of the other defendants in the instant case."

9. The aforesaid testimony, declaration and deposition of PAUL R. JONES, the defendant herein, as he then and there well knew, was untrue in that he met and conferred with LEO B. MITTELMAN on May 4, 1960, after the Government had rested its case, and remained in New York City until on or after May 6, 1960, at which time the defense was presenting its evidence. (Title 18, United States Code, Section 1621.)

COUNT TWO

The Grand Jury further charges:

10. On or about the 15th day of May 1962, in the Southern District of New York, LEO B. MITTELMAN, the defendant herein, having duly taken an oath before a competent tribunal, officer and person, to wit, a notary public, in a case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose and certify truly, and that a written testimony declaration, deposition and certificate by him subscribed is true, unlawfully, wilfully, knowingly and contrary to such oath did state and subscribe to material matter which he did not believe to be true, more particularly as follows:

"52. *The Jones affidavit.* I knew Paul R. Jones before the trial. I had met him in the summer of 1955, and I had last seen him in Birmingham on or about August 11, 1955 when I delivered 500,000 shares of Homestead stock to him which he

Appendix A

The government, in the case at bar, produced evidence that after the government rested, Mittelman, who had been informed by Jones that he could contradict Holland and Carroll as to some of their testimony, arranged a meeting of a number of the defendants and their counsel at the Royalton Hotel on May 4, 1960 at which Jones was present and talked at some length but apparently in a somewhat rambling fashion. Unimpressed by their observation of Jones, and informed of his criminal record, counsel decided not to call him as a defense witness. It is not clear whether Jones had gone to North Carolina when excused by the government May 2, and had come back at Mittelman's call on May 4, or whether he stayed on through May 4 or returned to North Carolina and came back once again after May 4, although it appeared that Mittelman's brother on May 6 cashed a check of Mittelman's for $300 to pay Jones' expenses.

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had stated he could sell. I met him again on several occasions during the trial, to which he had been subpoenaed as a witness. I discussed the case with him in a general way, and he told me that he was under instructions to report to the prosecutors at 4:30 P.M. at the end of each court session. He also told me that he expected to be called as a government witness, and that if he was not called and was released from the subpoena no one would be able to locate him. I confess that I could not decide whether to subpoena him or not. I did not have his confidence. Before I could make up my mind whether to issue a subpoena, or depend on his being called by the prosecutor, he was suddenly excused just before the defense was to begin, and he was not to be located."

11. The aforesaid testimony, declaration and deposition of LEO B. MITTELMAN, the defendant herein, as he then and there well knew, was untrue in that he met and conferred with PAUL R. JONES on May 4, 1960, after the Government had rested its case, and just before the defense was to begin, and that PAUL R. JONES remained in New York City until on or after May 6, 1960, at which time the defense was presenting its evidence. (Title 18, United States Code, Section 1621.)

Appendix A

The motion for new trial, and a companion motion for correction of an allegedly illegal sentence were denied. Notices of appeal were filed and the denial of correction of sentence was affirmed, 314 F. 2d 654 (2d Cir.), cert. denied 373 U.S. 923 (1963). The appeal from the denial of new trial was abandoned.

On Jones' appeal from the prejury conviction he contends principally that the evidence was insufficient, that it was error to deny his motions for severance, and to deny inspection of Jones' Grand Jury testimony until late in the government's case, and attacks the government's summation as improper and prejudicial. Jones also joins in Mittelman's contentions, which are, in addition to those of Jones, chiefly that it was error to deny earlier production of Mittelman's Grand Jury testimony, that the allegedly perjurious statement was not material to the issue to which the affidavit was addressed and that the indictment should have been dismissed since proof of a former conviction could not properly be used against him.

Neither Jones nor Mittelman took the stand in this perjury trial. Both, however, had testified before the Grand Jury, and transcripts of the testimony of each were read in evidence, with instructions, however, that it was not to be considered except as to the one whose testimony it was.

I.

Both object to the joinder for trial of the two counts of the indictment, one count charging Jones, the other Mittelman. These objections fail for two reasons. The indictment charged the preparation by Jones and Mittelman of false affidavits as to Jones' availability, to be filed with Mittelman's motion. Thus, the joinder of the two counts alleging that the defendants had "participated in the same act or transaction or in the same series of acts or trans-

actions constituting an offense or offenses" was well within the terms of Fed. R. Crim. P. 8(b). *United States* v. *Cohn*, 230 F. Supp. 587 (S. D. N. Y.), mandamus denied sub nom. *Application of Gottesman*, 332 F. 2d 975 (2d Cir. 1964). In the second place, no grounds for relief from prejudicial joinder under Rule 14 were shown. There need be no charge of conspiracy to make actions and declarations of joint actors in furtherance of a common illegal plan admissible against each actor. *United States* v. *Annunziato*, 293 F. 2d 373, 378 (2d Cir.), cert. denied 368 U. S. 919 (1961); *St. Clair* v. *United States*, 154 U. S. 134, 149 (1894); *United States* v. *Pugliese*, 153 F. 2d 497, 500 (2d Cir. 1945); *People* v. *Luciano*, 277 N. Y. 348 (1938). The evidence admitted against both could therefore have been admitted against either on separate trial and no prejudice from the joinder can be made out. See *United States* v. *Granello*, 365 F. 2d 990, 995 (2d Cir. 1966).

II.

The falsity of the statements of unavailability of Jones after May 2 was clearly proved by the testimony of Steinberg, one of defense counsel in the principal case as to the meeting in the described suite at the Royalton to assess Jones' desirability as a witness, that it was the sole meeting he attended there and that Jones talked at length at the meeting, taken together with the testimony of hotel employees and the plainly admissible hotel records fixing the date as May 4, reinforced by Mittelman's check for Jones' expenses cashed by Mittelman's brother on May 6.[2]

[2] On appeal from the convictions the evidence is to be viewed in the light most favorable to the government and all permissible inferences be drawn in its favor. *United States* v. *Kahaner*, 317 F. 2d 459, 467 (2d Cir.), cert. denied 375 U. S. 836 (1963); *United States* v. *Hall*, 346 F. 2d 875 (2d Cir.), cert. denied 382 U. S. 910 (1965); *United States* v. *Marchisio*, 344 F. 2d 653 (2d Cir. 1965).

Appendix A

III.

The evidence was clearly sufficient against each appellant to meet the strict requirements [3] of the prejury rule calling for the testimony of two witnesses or the testimony of one witness with corroborating circumstantial evidence. See, e.g. *United States* v. *Marchisio, supra,* n. 2; see also *United States* v. *Goldberg,* 290 F. 2d 729 (2d Cir.), cert. denied 368 U. S. 899 (1961), to the effect that documentary evidence plus the admissions of the accused are sufficient, as in the case at bar.

IV.

Judge Herlands was concerned over the possibility of prejudice in this trial if it should be revealed to the jury that Mittelman had been convicted in the *Crosby* case. The judge went to extraordinary lengths to attempt to keep knowledge of the conviction from the jury. Now appellants contend that he did not go far enough, for in spite of all precautions the word "prosecutor" crept in, and the claim is that this must have revealed the whole situation to the jury. If this were important, we would be inclined to hold that this was insufficient to place the earlier crime before the jury so that appellants were convicted because of it rather than the evidence of the instant offense. We need not, however, waste much time in speculating how much the jury did, in fact, divine, for the fact of the conviction was relevant and material to show the strong motive the fact provided for the making of the false affidavits, and we will not deprive the trier of this evidence merely

[3] Some authorities maintain that the peculiar rule for perjury cases is too strict. See Report of the President's Commission on Law Enforcement and Administration of Justice, U. S. Government Printing Office 1967, p. 201.

because the crime here necessarily bore a close relationship with an earlier crime. The essence of the crime related to the conviction. Reference to another crime is barred only if introduced solely for the purpose of showing that the defendant "committed the crime on trial because he is a man of criminal character." *United States* v. *Bozza,* 365 F. 2d 206, 213 (2d Cir. 1966). Cf. *Spencer* v. *Texas,* — U.S. — (January 23, 1967).

V.

Mittelman contends further that even if the statements be found untrue as used, they were not material to the proceeding in which they were used, his application for new trial. Materiality of the statements was correctly held to be an issue for the court, which held them material. *United States* v. *Siegel,* 263 F. 2d 530, 533 (2d Cir.), cert. denied 359 U. S. 1012 (1959). The claim that they were erroneously held material must be rejected. Even if, as is now claimed, the main thrust of the motion was not newly discovered evidence that Jones would contradict government witnesses Carroll and Holland, but that Jones would testify that he had informed the government of the claimed falsity of Holland's and Carroll's testimony and the government had used it regardless and that Jones had not revealed this to Mittelman until after the trial, the statements would still be material. The court before which the motion was pending would be interested in knowing not only whether Jones had told those details to Mittelman, but whether he was available, whether he talked at all to Mittelman, when and to what extent, so that not only the truth of the statements could be tested, but also Mittelman's diligence in inquiring. Diligence is material on any claim of newly discovered evidence. *United States* v. *Pellegrino,* 273 F. 2d 570 (2d Cir. 1960); *United States* v. *Costello,* 255 F. 2d 876, 879 (2d Cir.), cert. denied 357 U. S. 937 (1958); *United States* v. *Abrams,* 357 F. 2d 539, 550 (2d Cir.), cert. denied 384 U. S. 1001 (1966).

Appendix A

VI.

Jones contends that his affidavit was not perjurious because paragraphs 4 and 5 may be taken separately and as referring to two separate dates as to which they were not shown to be untrue. This claim is, however, of no avail, for even if each paragraph, taken separately out of context were true, though relating to different times, if in the natural meaning in the context in which used they were materially untrue, perjury was established. See *Meyers* v. *United States,* 171 F. 2d 800, 806-7 (D. C. Cir. 1948), cert. denied 336 U. S. 912 (1949). And the jury could validly find wilfulness from the manner and context in which they were used. The wording gives no hint that they are not parts of a connected narrative, and since they were prepared and used in connection with Mittelman's affidavit containing the final sentence of paragraph 52 entitled *The Jones Affidavit,* "Before I could make up my mind whether to issue a subpoena, or depend on his being called by the prosecutor, he was suddenly excused just before the defense was to begin, and he was not to be located," the court to which they were addressed, and the jury here were fully justified in interpreting them as representing that Jones had suddenly and unexpectedly become unavailable to Mittelman. The jury in the light of the proof of the Royalton meeting was also entirely justified in finding that the statements were deliberately false.

VII.

We fail to see any prejudice in the admission of the Grand Jury testimony under proper limiting instructions. Mittelman's testimony before the Grand Jury fixing the date of the Royalton meeting as May 4, even if considered by the jury against Jones in violation of the instructions,

was merely cumulative to the independent relevant and convincing documentary evidence. Compare *United States* v. *Casalinuovo,* 350 F. 2d 207, 212 (2d Cir. 1965).

VIII.

Appellants moved pre-trial and during the trial for inspection of their Grand Jury testimony which was refused until late in the presentation of the government's case. We find no prejudicial error in the failure earlier to grant inspection of the Grand Jury testimony. While discovery under Rule 16(a), F. R. Crim. P., might be granted even in cases such as this pending prior to the amendment to the rule effective July 1, 1966 "so far as just and practicable," grant of discovery was not mandatory. Even if it were, we could find no prejudice to appellants here, for full transcripts were supplied before any portion was offered in evidence, and overnight recess was thereafter granted to enable counsel "to understandably and knowledgeably digest" the transcripts.

We have examined appellants' other contentions and find none which require further discussion.

The judgments of conviction are affirmed.

APPENDIX B

Constitutional Provisions, Statutes and Rules Involved

UNITED STATES CONSTITUTION

Article I, § 1:

"All legislative Powers herein granted shall be vested in a Congress of the United States. * * *"

Article I, § 7:

"Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States * * *."

Article I, § 8:

"The Congress shall have Power * * * To constitute Tribunals inferior to the Supreme Court; * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department * * * thereof."

Fifth Amendment:

"No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *."

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy * * * trial, * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him * * *."

Appendix B

STATUTES

18 U. S. Code, § 1621, 62 Stat. 73, 78 Stat. 995:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, * * * willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury * * *."

Act of August 15, 1876, c. 304, 19 Stat. 206 [U. S. Comp. St. 1091, p. 662].

> "That notaries public of the several States, Territories, and the District of Columbia be, and they are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits, in the same manner and with the same effect as commissioners of the United States circuit court may now lawfully take or do."

Act of June 25, 1948, c. 646, § 39, 62 Stat. 869, 992, 994:

> "The sections or parts thereof of * * * the Statutes at Large enumerated in the following schedule are hereby repealed. * * *

	STATUTES AT LARGE				U. S. CODE	
Date	Chapter	Section	Volume	Page	Title	Section
1876 * * *						
Aug. 15	304	—	19	206	28	642."

Appendix B

5 U. S. Code § 92, 29 Stat. 184:

"Taking Oaths or Acknowledgments. In all cases in which, under the laws of the United States, oaths or acknowledgments might be taken or made on June 22, 1874, before any justice of the peace of any State or Territory, or in the District of Columbia, they may be also taken or made by or before any notary public duly appointed in any State, District or Territory, or any of the United States commissioners, and, when certified under the hand and official seal of such notary or commissioner, shall have the same force and effect as if taken or made by or before such justice of the peace."

5 U. S. Code, § 92(a), 44 Stat. 830:

"Oaths Required by United States; administration by notaries public and other State officers. In all cases in which, under the laws of the United States, oaths are authorized or required to be administered, they may be administered by notaries public duly appointed in any State, District, or Territory of the United States, * * *."

18 U. S. Code, § 3772, 63 Stat. 98, 72 Stat. 348, 73 Stat. 11:

"The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt * * * in criminal cases * * * in the United States district courts * * *."

Appendix B

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 8(b):

"Joinder of Defendants. Two or more defendants may be charged in the same indictment * * * if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. * * *"

Rule 14:

"Relief from Prejudicial Joinder. If it appears that a defendant * * * is prejudiced by a joinder of offenses or of defendants in an indictment * * * or by such joinder for trial together, the court may * * * grant a severance of defendants or provide whatever other relief justice requires."

Rule 33:

"* * * A motion for a new trial based on the ground of newly discovered evidence may be made * * *."

Rule 47:

"* * * A motion * * * shall be in writing unless the court permits it to be made orally. * * * It may be supported by affidavit."

SUPREME COURT, U. S.

JUN 6 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. [redacted] 223

LEO B. MITTELMAN,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEO B. MITTELMAN, *pro se,*
124 East 30th Street,
New York, N. Y. 10016.
Tel. No. MU. 9-1114

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

LEO B. MITTELMAN,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice and the
Associate Justice of the
Supreme Court of the United States

Petitioner respectfully requests this Court to issue a Writ of Certiorari to review the final judgment of the Court of Appeals for the Second Circuit which affirmed petitioner's conviction under 18 U. S. C. Sec. 1621.

The Opinion Below

The Court of Appeals' opinion is reported at 374 F. 2d 414. There was no opinion on its denial of petition for rehearing. There was no opinion in the District Court. A copy of the opinion is annexed to application of co-defendant Jones, marked Ex. A.

The Grounds of Jurisdiction

(a) The judgment sought to be reviewed was dated and entered March 14, 1967.

(b) Timely petition for rehearing was filed and denied on April 7, 1967.

(c) Extension of time to file this petition was extended by Mr. Justice Harlan to June 6, 1967.

(d) Jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

Questions Presented

1. Whether the decision in the instant case holding it to be a material fact that an accused has allegedly failed to call a witness whose testimony was suppressed by the prosecution is in conflict with the decision of the Court of Appeals for the District of Columbia in *Levin* v. *Katzenbach*, 363 F. 2d 287.

2. Whether on a motion for a new trial based in part on suppression of evidence favorable to an accused, an accused forfeits his rights for failure to call an available witness who is a named co-conspirator, who is under subpoena by the government and not called by it, who has a long criminal record, whose interests might be in conflict with the interests of the accused, and who, in practical effect, is a "captive" of the government.

3. Whether a charge of perjury can stand as a matter of law based on an alleged false statement in an affidavit supporting a motion for a new trial, where the alleged false statement purports to be a summary, interpretation

or characterization of the affidavit of another which is also annexed in full to the moving papers.

4. Whether petitioner's constitutional rights were violated by inclusion in the indictment recitals of the prior conviction from which he had been seeking relief.

5. Whether where so-called ground rules were established for the express purpose of keeping from the jury all knowledge of the prior conviction, said ground rules were violated by the prosecutor and the trial judge to the prejudice of petitioner.

6. Whether petitioner's motion for a severance based on prejudice should have been granted; and in the circumstances where a motion under Rule 14 of the Rules of Criminal Procedure takes precedence over Rule 8 (b).

7. Whether it was proper to join in one indictment two defendants, each of whom had a criminal record with the result that, in practical effect, neither could call the other as a witness; and, particularly where the indictment did not allege conspiracy, plot, scheme, or aiding and abetting.

8. Whether on a motion for a new trial in a criminal case the parties to the controversy submit the case to the qualified tribunal on an agreed upon theory, may a trial judge in subsequent and different criminal proceedings substitute his own subjective and different theory in passing on the materiality of an alleged perjurious statement in the affidavit in support of the said motion for a new trial.

9. We respectively refer the Court to the questions and the supporting arguments presented by co-defendant Paul R. Jones in his companion application for a writ.

Constitutional Provisions, Statutes and Rules Involved

United States Constitution

Article I, § 1:

> "All legislative Powers herein granted shall be vested in a Congress of the United States. * * *"

Article I, § 7:

> "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States * * *."

Article I, § 8:

> "The Congress shall have Power * * * To constitute Tribunals inferior to the Supreme Court; * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution, in the Government of the United States, or in any Department * * * thereof."

Fifth Amendment:

> "No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *."

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy * * * trial, * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him * * *."

Statute and Rules Involved

Title 18, United States Code

§ 1621. Perjury generally

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

Federal Rules of Criminal Procedure

Rule 8(b):

> "Joinder of Defendants. Two or more defendants may be charged in the same indictment • • • if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. • • •"

Rule 14:

> "Relief from Prejudicial Joinder. If it appears that a defendant • • • is prejudiced by a joinder of offenses or of defendants in an indictment • • • or by such joinder for trial together, the court may • • • grant a severance of defendants or provide whatever other relief justice requires."

Rule 33:

Rule 33. New Trial*

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment. . . .

Statement of Case

A. Introductory

The instant indictment in two counts charges perjury in violation of 18 U. S. C. (Sec. 1621). Count 1 involves the defendant Paul R. Jones, and Count 2, petitioner.*

The trial judge imposed a sentence of 18 months pursuant to 18 U. S. C. (Sec. 4208 (a) (2).

Count 2 of the instant indictment, against petitioner charged him with a false statement in an affidavit of May 15, 1962 in support of his motion for a new trial in a previous proceeding entitled *United States* v. *Crosby, et al.*, 294 F. 2d 928 (2d Cir. 1961), cert. denied sub nom. *Mittelman* v. *United States,* 368 U. S. 984 (Feb. 19, 1962).

In the prior proceeding, petitioner was one of twelve persons in an indictment of 50 counts which charged violation of 15 U. S. C. (77e (a) (1), 77e (a)(2) and 77x, and 18 U. S. C. (Secs. 371 and 1341-43 in their dealings with the stockholders of Texas-Adams Oil Company, Inc., a

* Co-defendant Jones has also applied for a writ of certiorari in this case. To avoid repetition, many of the questions and arguments raised by him are not presented by petitioner herein. It is respectfully requested that they be considered with respect to petitioner as though herein urged.

Delaware Corporation (Texas-Adams). The instant perjury case thus had its origins in the *Texas-Adams* case.

In the prior proceeding, petitioner was indicted on all counts but the first. He was convicted only on Counts 2 and 50. Count 2 charged a scheme to defraud by use of the mails in violation of 18 U. S. C. (1341-42). Count 50 charged a conspiracy in violation of 18 U. S. C. (Sec. 371).

Petitioner was given the maximum prison sentence of five years on Count 2, and then an additional maximum prison sentence of five years on Count 50 to run consecutively to the prison sentence imposed on Count 2. The execution of the prison sentence imposed on Count 50 was suspended, and he was placed on probation for that five years, the probation to begin at the end of the prison sentence imposed on Count 2.

After the denial of certiorari by the United States Supreme Court, petitioner made a motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure, and 28 U. S. C. (Sec. 2255).

Judge MacMahon denied the motion for a new trial, with an endorsement on the moving papers: "The allegations of the moving papers are insufficient particularly in the light of the trial record. Accordingly, the within motion is in all respects denied. So ordered." It is to be noted that petitioner had no hearing even though, as hereafter appears, there were numerous controverted issues of fact.

B. Events Leading to Indictment

After Judge MacMahon denied petitioner's motion for a new trial, he appealed. While the appeal was pending a Grand Jury investigation was instituted with regard to alleged perjurious statements contained in the supporting affidavits of petitioner and co-defendant Jones.

Jones was subpoenaed by the Grand Jury. He appeared and testified (JA 35, *et seq.*).* Apprised of the investigation while he was serving his sentence, petitioner requested permission to appear and testify.

Thereafter, petitioner and co-defendant Jones were indicted (JA 2, *et seq.*).

C. Admissions of Use of Perjury and Suppression: Addressed to Point I

Following the denial of application for a writ of certiorari in the *Texas-Adams* case and while petitioner was in prison serving his sentence, petitioner moved for a new trial pursuant to Rule 33 of the Rules of Criminal Procedure and Sec. 2255 of 28 U. S. C.

The thrust of his motion as set forth in his supporting affidavit was stated as follows:

> "It is my contention on this motion that the government:
>
> (a) knowingly used perjurious testimony as to material issued against me at my trial;
>
> (b) suppressed evidence in its possession favorable to my defense; and
>
> (c) not only used perjured testimony against me and suppressed evidence favorable to me, but also compounded these injuries by making me the butt of a whipsaw technique, which consisted of the introduction of conflicting testimony and then the assumption of a self-righteous position that it was presenting the whole story." (Govt. Ex. 18, p. 2)

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* References preceded by "JA" refer to the joint appendix in Court of Appeals; "GA" to government appendix in Court of Appeals; "TR" to stenographer's transcript in Trial Court; "APP" refers to the appendix to this application.

The Court of Appeals in the *Texas-Adams* case said with respect to petitioner's brief "that some apparently damaging testimony has been convincingly explained away" (by Mittelman) 294 F. 2d at 938. But just before that the Court said:

> "Any conclusion of Mittelman's innocence must rest upon the hypothesis that Holland and Carroll, the moving parties in Homestead Oil & Uranium, plus Kimmes, a Denver broker and co-conspirator, perjured themselves; that Harrison Miller, a New York broker, was mistaken as to dates when he testified that Mittelman vouched for Jannis in mid-November of 1955; that Purcell, an experienced securities attorney, was mistaken in his testimony concerning Mittelman and the Empire transaction; and that Mittelman was unbelievably hornswoggled by McCarthy due to an incredible naivete on the part of an experienced attorney."

Petitioner's supporting affidavit spelled out in specific detail the perjuries of Carroll and Holland, and met the other doubts voiced by the court.

(Government Ex. 18 and Mittelman Ex. B were not printed for use in the court below. Extensive excerpts have been printed in the appendix submitted with this application. References to the facts in those excerpts are preceded by "App.").

Petitioner spelled out, too, the concessions by the prosecution that Carroll and Holland had indeed lied with respect to matters vital to petitioners' defense.

Petitioner spelled out, too, the failure of the prosecutor to disavow the perjuries.

Petitioner spelled out, too, the evidence which was suppressed.

Petitioner spelled out too, the prejudice which resulted from the perjuries, the suppressed evidence and the failure to disavow the perjuries.

Petitioner did not indulge in generalities. He was specific in his proofs.

Yet he was denied a hearing.

The Perjuries of Carroll

The perjuries of Carroll are set forth in paragraphs 18, 19, 20, 21 (APP. 6a, 7a,) and 26, 27 (APP. 8a, 9a). The reasons why the lies seriously prejudiced petitioner are explained in the introductory paragraphs 12-17 (APP. 1a-4a).

A brief resumé is in order. The Texas-Adams take over by certain of the defendant's in that case was claimed to be fraudulent. It was not charged that petitioner was involved in the take over scheme (APP. 2a, ¶13). But it was charged that he joined the conspiracy after the take over to hide prior derelictions involving a company later merged with Texas-Adams, Homestead Oil and Uranium Company with which the witness Carroll was associated as promoter and broker (App. 2a, ¶13).

Carroll's testimony placed petitioner in the middle of negotiations involving Texas-Adams and Homestead (APP. 4a, ¶19). If true, the government's theory of motive and prior association with Texas-Adams would possibly have been established.

But the government knew this testimony was false.

In his affidavit in support of his motion petitioner set forth his proofs that the government deliberately elicited false testimony and failed to disavow it. The proof was a

concession by the government that Carroll had lied, and that it knew this to be so. (Paragraphs 22-24 of Ex. 18—APP. 6a and 7a.) Petitioner's affidavit quote verbatim the concessions of perjury as follows:

> "Carroll's testimony that Texas-Adams was mentioned at the July 22 meeting was unquestionably wrong."
>
> "There is, of course, no way of knowing whether Carroll's recollection was in error or whether he wilfully perjured himself."

The government also said that it would have been "grossly improper" to prevent Carroll "from testifying to what was his recollection" and that it "had no choice but to permit Carroll to testify as his recollection dictated".

The numerous perjuries are itemized in ¶19 of the affidavit (APP. 4a, 5a).

The Perjuries of Holland

Holland's perjuries are set forth in specific detail in petitioner's affidavit (APP. 10a, 11a and 12a). Holland was the president of Homestead Oil and Uranium Co. (APP. 12a). In its opening to the jury in the Texas-Adams case the government said it would prove that petitioner's motive for joining the Texas-Adams conspiracy was to hide his misappropriation of $69,000 of Homestead's money and 1,500,000 shares of its stock and this was Holland's testimony (APP. 11a).

Holland was put on the stand to prove these charges against petitioner. When it became clear that none of this was true, the government's refuge was that it did not press the point in its summation.

But it did not disavow the testimony of Holland. The jury was left to wonder whether the accusations were true or merely forgotten in the mass of detail it was required to study and decide.

In the answering affidavit the government attorney said:

> "Nowhere does he (petitioner) point *out* to a single instance in which the prosecutor made such argument to the jury (Ex. B. p. 5)."

The Supressed Evidence

Annexed to petitioner's motion papers is the affidavit of co-defendant Paul R. Jones. It is set forth in full in the appendix herewith (APP. 18a-28a).

Jones promoted Homestead Oil and Uranium Co. Carroll was his partner. Jones put up the money. Holland was Jones's front for the sale of stock (APP. 21a, ¶10 *et. seq.*)

Jones was named as a con-conspirator in the Texas-Adams case.

Jones was under government subpoena, and while in New York reported daily to the prosecutors (APP. 21a, ¶10).

Jones advised the prosecutors that if called as a witness he would have to expose the lies told by them regarding petitioner's association with Homestead and Texas-Adams (APP. 21a, ¶10).

Jones was not called by the government as a witness. He was excused by the government and was told he could leave New York (APP. 19a, ¶5).

All of this is set forth in Jones' affidavit in the Appendix (APP. 18a, *et. seq.*).

In his answering affidavit in opposition to petitioner's motion for a new trial, Arnold Enker, government assistant in charge of the matter conceded the above stated facts with regard to Jones. (Excerpts from his affidavit are contained in the Appendix—28a *et seq.*).

A paragraph from his affidavit is to the point.

8. Even assuming that Jones so advised Government counsel before trial, the Government was not obliged to take Jones's word against that of Holland and Carroll. Government counsel were familiar with Jones' extensive criminal record, which includes convictions for first degree murder for which he received a life sentence, wartime violation of the O. P. A. Ration Act, vagrancy, bribery for which he received 3 years in prison and conspiracy to conceal narcotics for which he received 5 years in prison, and had good reason to accept Holland and Carroll's testimony as against that of Jones. Indeed, Mittelman himself in his brief on appeal characterized Jones as "shadowy" (P. 49), an "unscrupulous scoundrel" (P. 52) and "the author of the nefarious Osage Scheme" (P. 52 n. 62). Thus, at best, the issue boiled down to nothing more than a conflict of testimony between two witnesses of unblemished reputation and a convicted murderer, briber and narcotics dealer who had been named in the indictment as a conspirator. The contention that by rejecting Jones' version in favor of Holland and Carroll Government counsel "knowingly used perjurious testimony" is as scandalous as it is absurd (APP. 24a).

But this is the same Mr. Enker who in his brief in the Texas-Adams case had conceded that Carroll and Holland had lied. And if this was so, then Jones, despite his record and reputation, was in this instance telling the truth, and the prosecutors had to know it.

The suppression was deliberate. Jones' testimony would have destroyed the whole theory of motive, and the government would have to tell the jury that it was Jones whose testimony was truthful.

The Court of Appeals in the Texas-Adams case appreciated the prejudicial nature of this testimony but let it stand, it would appear, because it believed that Carroll and Holland had been truthful.

The Government did not call Jones whose testimony would have demolished the Government's structure of motive. It was not a question of not believing or trusting Jones. If Holland and Carroll were liars, as the Government now admits, then the contradictions of Jones were necessarily truthful; and the duty to so advise the jury was clear.

(The facts above set forth are applicable to the argument under Point I.)

D. The Alleged Perjurious Statement Upon Which Indictment Is Based

After setting forth the perjuries of Carroll and Holland and the failure of the prosecutor to disavow them, the suppression of favorable evidence and the general unfairness of the trial procedure in the Texas-Adams case, petitioner referred to the contents of the additional affidavits supporting his motion. One of such affidavits is that of co-defendant Jones (APP. 18a-28a). The statement in regard to the Jones affidavit as it was set forth in petitioner's affidavit (Government Ex. 18) (¶52) is as follows:

> "52. *The Jones Affidavit.* I knew Paul R. Jones before the trial. I had met him in the summer of 1955, and I had last seen him in Birmingham on or about August 11, 1955 when I delivered 500,000

shares of Homestead stock to him which he had stated he could sell. I met him again on several occasions during the trial, to which he had been subpoenaed as a witness. I discussed the case with him in a general way, and he told me that he was under instructions to report to the prosecutors at 4:40 P. M. at the end of each court session. He also told me that he expected to be called as a government witness, and that if he was not called and was released from the subpoena no one would be able to locate him. In confess that I could not decide whether to subpoena him or not. I did not have his confidence. *Before I could make up my mind whether to issue a subpoena or depend on his being called by the prosecutor, he was suddenly excused just before the defense was to begin, and he was not to be located.* (Italics ours.)

"I always knew that if Jones told the truth, he could prove that Holland, Carroll and his former partner Graham were consummate liars. In a sense, therefore, while I could not know all the facts to which he could give answers, I knew that if he told the truth he could not hurt me.

"I did not know, however, what he later told me when I met him by chance in New York some months ago, that time after time he had demonstrated to the government attorneys that Carroll and Holland had been lying. There can be little doubt that he was not called because his testimony would not have supported Holland and Carroll—indeed would have destroyed them as government witnesses, and because his testimony would not have been consonant with the government's theory of the Homestead evidence.

> "While from a strict and narrow point of view it might be argued that I had an opportunity to call Jones as my witness, it cannot be gainsaid that the government had a duty to give the jury all the true facts after having exposed the jury to false facts. In a very real sense I was trapped by the government's tactics. The government played an unfair game with marked cards and loaded dice. This might pass in a civil suit, but it does not conform to the dignity of these United States.
>
> "I say that Jones testimony would have done much to sway the jury in my favor. Not only that, it would have compelled the trial court, in my opinion, to strike all the prejudicial Homestead testimony upon which the government had relied in connecting me with the Count I wire fraud scheme."

The italicized portion of ¶52 entitled "The Jones Affidavit" is the basis of the perjury charge. It is contended that by this statement petitioner conveyed the idea that Jones was unavailable to be called by him as a witness between the time the government rested its case (May 2, 1960) and the time the defense was to begin (May 5, 1960) when in fact petitioner and others met with Jones on May 4, 1960 at the Hotel Royalton in New York City, and when in fact Jones did not leave New York until May 6, 1960, one day after the general defense began to put in its case (Indictment: JA 2 *et seq.*).

It was also contended that petitioner sought to convey the idea that Jones' testimony was newly discovered testimony.

The trial Judge, who had the duty of determining the question of materiality, indulged in the following specula-

tive gymnastics without a shred of evidence to support him:

> "In fact, Mr. Mittelman and his lawyers played a calculated game of judicial poker. The stakes were high. They conferred about this thing. They decided not to use Jones, for reasons best known to themselves, which are elucidated in the grand jury minutes, and they took a calculated risk and, Mittelman was convicted.
>
> "Then, they go and, of course, according to the evidence here, Mittelman knew all the time about Jones, so in 1960, after he had been convicted, he doesn't make a motion on any theory, whether it is Rule 33, newly-discovered evidence, or whether it is Section 2255. He had in 1960 exactly what he had in 1962, but he sits by and waits because that is part of the poker game.
>
> "Then he goes to the Court of Appeals, and the Court of Appeals affirms, and he is still playing the poker game.
>
> "Then he goes to the Supreme Court, and he is still playing poker, and the Supreme Court denies certiorari.
>
> "Then, after the Supreme Court is all through, and he is all washed up with the appellate review, he decides the time has come to pull out the trump card. I may be mixing up the different games, but Jones is the trump card. Then they make this motion for a new trial, in which they make the most horrendous accusations at the Government and eventually this indictment results" (Tr. 477-78).

The so-called "horrendous" charges, which apparently excited the trial Judge to make his uncalled for accusations

against a responsible and respected member of the bar, Mr. O. John Rogge, were never denied by the government. What the government did was to offer untenable excuses for its conduct.

The trial judge focussed on that portion of petitioner's motion papers which raised the point of newly discovered evidence. But petitioner never contended that all of the evidence he proposed to offer was newly discovered. Indeed it will be recalled that in discussing the Jones evidence he expressly disavowed its character as "newly discovered". But the trial judge centered on general statements in the affidavit and applied them to the Jones affidavit despite petitioner's disclaimer, as indicated in the quoted portion, *supra,* page 16.

The trial Judge's preoccupation with this aspect of the case carried over and influenced the Court of Appeals. His comments were not printed below but appear in the appendix to this application (APP. 27a *et seq.*).

So it must be clear that the thrust of the motion with regard to the proposed Jones testimony was not "newly discovered evidence".

Heading "52" of petitioner's affidavit quoted in full above is a mixture of fact and conclusion. It must be read in its entirety to determine whether petitioner intended to deceive or mislead in his discussion of the proposed Jones evidence. In addition, it must be read together with the Jones affidavit which was annexed to petitioner's motion papers and which appears in the Appendix herewith (APP. 18a *et seq.*).

Even the government recognized the fact that petitioner was not basing the proposed Jones testimony as "newly discovered". In opposing the motion for a new trial,

Mr. Enker, government attorney's wrote (Mittelman Ex. B, p. 7, ¶14):

> "14. Actually Mittelman's own papers concede that the facts of this case do not amount in law to newly discovered evidence. (Mittelman affidavit par. 52 at p. 36). Instead, he rests in the final analysis on the contention that the Government was under a duty to call Jones as its witness. It is respectfully submitted that the Government was under no duty to call as a witnes and vouch for the credibility of a person with such a criminal record who was a participant in the fraud charge in the indictment. This is particularly so here where with respect to the only two matters of which Mittelman complains that were adduced by the Government, Government counsel also adduced the contradicting testimony."

In the final analysis it must be clear that petitioner in ¶52 was giving his interpretation of what Jones would testify to and Jones' statement of his relationship to the prosecutor. Jones stated he was under subpoena for a long time (APP. 192), that he conferred regularly with the prosecutors during the Texas-Adams trial (APP. 19a), that he was finally excused just before the government "rested" (APP. 19a), and that on leaving New York it would not be possible to locate him (APP. 19a).

In his affidavit petitioner attempted to summarize the contents of the Jones affidavit which was set forth in full in the group of supporting affidavits for all to see—and compare (Government Ex. 18).

Assuming that petitioner's summary was inaccurate in some details, it is absurd to assume evil intent to mislead since comparison was available.

These facts are directed to the proposition that perjury cannot be predicated where the statement alleged to be perjurious is an interpretation of the statement of another where that statement is in juxtaposition with the statement alleged to be perjurious.

E. Facts Relating to Improper References in Indictment to Prior Conviction

The introductory paragraphs of the indictment, 1 through 7, contain the offending material (JA. 2a *et seq.*).

Reference is also made to paragraph 10 of the indictment which incorporates paragraph 52 of petitioner's affidavit in support of his motion for a new trial, and which states that Jones was required to report each day to the "prosecutors' and that petitioner was undecided to call Jones or depend on the "prosecution" to do so (JA. 6a, ¶10).

We argue hereafter that such recitals are fatal to an indictment unless appropriate means are available and used to avoid prejudice and denial of a fair trial.

F. Facts Relating to Trial Procedure

To avoid possible prejudice to petitioner from the recitals of a prior criminal offense the trial judge suggested that ground rules be adopted to keep these facts from the jury (GA. 1a, 15a, 38a).

In his opening to the jury and in his summation, and the trial judge in his charge to the jury read the following excerpt from petitioner's affidavit which was contained *verbatim* in the indictment:

> "52. The Jones affidavit. I knew Paul R. Jones before the trial. I had met him in the summer of 1955, and I had last seen him in Birmingham on or

about August 11, 1955 when I delivered 500,000 shares of Homestead stock to him which he had stated he could sell. I met him again on several occasions during the trial, to which he had been subpoenaed as a witness. I discussed the case with him in a general way, and he told me that he was under instructions to report to the *prosecutors* at 4:30 P.M. at the end of each court session. He also told me that he expected to be called as a government witness, and that if he was not called and was released from the subpoena no one would be able to locate him. I confess that I could not decide whether to subpoena him or not. I did not have his confidence. Before I could make up my mind whether to issue a subpoena or depend on his being called by the *prosecutor* he was suddenly excused just before the defense was to begin, and he was not to be located." (Emphasis ours.)

We argue hereafter that when this was read to the jury, the jury was apprised of petitioner's prior conviction, particularly when coupled, with other disclosures however cloaked in euphemisms.

In addition the Grand Jury testimony of petitioner was read to the jury (JA 10a, *et seq.*). Such was its nature that the trial judge was compelled to caution the jury not to speculate as to the nature of the prior proceeding—a procedure calculated to cause speculation rather than to stifle it.

The Ground Rules permitted the government to have it both ways, whereas petitioner was effectively shackled from making a defense against certain speculative and subjective issues raised by the prosecution.

The Court of Appeals saw no prejudice because it was its opinion that the evidence of prior criminal conviction

would have been admissible in any event (374 F. 2d at p. 419).

It is our contention that even if, *arguendo,* such evidence would have been admissible, it became non-admissible because of the Ground Rules.

G. Facts Relating to the Trial Court's Misconception of Materiality Issues.

The trial judge had to decide the question of whether the statement alleged to be perjurious was in fact material to the issues involved in the Sec. 2255 proceeding. He approached this question with a built in bias against anyone who dared impute to dedicated prosecutors anything but the noblest of motives, intentions and propriety of conduct. Then he opined that petitioner's application of a new trial was the result of a calculated scheme born at the meeting of May 4, 1960, to hold Jones in reserve for the very eventuality of a motion to get a new trial if a conviction resulted and all appeals in ordinary course failed. To this he added his own reading of the motion as one falsely based on newly discovered evidence. He refused to accept petitioner's averment in his affidavit that Jones' evidence could not be deemed newly discovered evidence, nor of the government's concession in opposition to the motion that no such claim was being made. He put it this way:

> "In the instant case the government sought to establish motive and ulterior purpose by contending that Mittelman in his desperation while he was incarcerated dreamt up an attack on our judicial system by a perverted and corrupt use of 28 U. S. C. (2255). The trial judge to use the vernacular, bought the argument. During the trial he said:
>
> 'In fact, Mr. Mittelman and his lawyers played a calculated game of judicial poker. The stakes

were high. They conferred about this thing. They decided not to use Jones, for reasons best known to themselves, which are elucidated in the grand jury minutes, and they took a calculated risk, and Mittelman was convicted.

'Then, they go and, of course, according to the evidence here, Mittelman knew all the time about Jones, so in 1960, after he had been convicted, he doesn't make a motion on any theory, whether it is Rule 33, newly-discovered evidence, or whether it is Section 2255. He had in 1960 exactly what he had in 1962, but he sits by and waits because that is part of the poker game.

'Then he goes to the Court of Appeals, and the Court of Appeals affirms, and he is still playing the poker game.

'Then he goes to the Supreme Court, and he is still playing poker, and the Supreme Court denies certiorari.

'Then, after the Supreme Court is all through, and he is all washed up with the appellate review, he decides the time has come to pull out the trump card. I may be mixing up the different games, but Jones is the trump card. Then they make this motion for a new trial, in which they make the most horrendous accusations at the Government, and eventually this indictment results'." (TR. 477-78)

There is not a shred of evidence to support this charge. Indeed it will be recalled that in discussing the Jones affidavit and his proposed evidence, that petitioner conceded the availability of Jones, and that in his appeals in the *Texas-Adams* case he attacked the knowing use of

perjured testimony against him. He did not "dream up" these accusations as afterthoughts. But the trial judge, creating and believing this, went awry on the question of materiality, motive and intent.

H. Facts Relating to Severance and Prejudicial Joinder

We refer the Court to the statement of the case on this issue as argued by co-defendant Jones.

We approach the problem somewhat differently by arguing that joinder made confrontation impossible, and that the Government and Grand Jury knew it. This was true as a practical matter because of the prior criminal records of both defendants.

Reasons for Allowing Writ

1. The Court below has decided important questions of Federal criminal law in conflict with principles set forth in *Levin* v. *Katzenbach* decided recently by the Court of Appeals for the District of Columbia, 363 F. 2d 287. The question involves the extent of the duty imposed on a defendant on a motion for a new trial to overcome the knowing use of perjurious testimony by the prosecution and the suppression of favorable testimony.

2. The Court below erred in holding that perjury may be upheld on basis of an alleged false statement based on interpretation or characterization of the statement of another even where the statement relied on is fully set forth so that it might be compared.

3. The Court below has decided an important question of Federal criminal law which has not been previously passed on by this Court by its ruling that recitals in an indictment of a prior criminal conviction are not preju-

dicial under proper admonitions to the jury even where Ground Rules providing for avoidance of disclosure are violated by the prosecutor and the trial judge.

4. The Court below erred and denied petitioner his right to a fair trial, by giving precedence to Rule 8(b) of the Rules of Criminal Procedure providing for joinder of defendants over Rule 14 providing for severance where prejudice is obvious.

5. The Courts below erred when they failed to accept as judicial admissions the agreed theory on which a motion for a new trial was presented to the appropriate and original tribunal which decided the issue as so presented.

6. For the reasons and arguments set forth in the application for a writ by co-defendant Jones previously filed herein.

SUPPORTING ARGUMENTS

POINT I

This court should determine whether perjury may be charged for an alleged untruthful statement as to the availability of a witness made in an affidavit in support of a motion for a new trial where absent the statement and the fact, the applicant for a new trial would be entitled to relief.

It would be an effort of supererogation to discuss the long line of cases in which this court has defined the duty of prosecutors in criminal cases. These decisions sternly warn of the consequences of such derelictions as suppression of evidence and use of perjury to secure convictions.

However, a discussion of the case of *Levin* v. *Katzenbach* (363 F. 2d 287) is particularly applicable and instructive.

By a divided court it was held that even where a witness was equally available to the defense, the failure of the prosecutor to call the witness whose testimony MIGHT be favorable to the accused, or possibly raise a reasonable doubt a remand would be required.

Judge Bigelow, writing for the majority stated the general principles involved:

> "Relief would be available, of course, had the government deliberately presented a false picture of the facts, either by knowingly using perjured testimony, failing to correct testimony when it became apparent that it was false, or actively suppressing evidence known to be exculpatory. But appellant urges on this appeal that the court below erred when it limited itself to findings on the question of deliberate suppression. He argues that his rights were violated if the government negligently failed to disclose that neither McCeney nor Hooper remembered exchanging the $1,000 bills for twenties.
>
> • • •
>
> "A number of circuits have recently held that the deception that results from negligent nondisclosure is no less damaging than that which is a product of guile and that such nondisclosure entitles the defendant to relief. We find the reasoning of such cases persuasive and essential to the fair administration of criminal justice especially in view of the disadvantages facing the accused in the trial process. See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).
>
> • • •

"Thus appellant would be entitled to relief in the present case if the government failed to disclose evidence which, in the context of this case, might have led the jury to entertain a reasonable doubt about appellant's guilt. Such a failure may be classified as negligence. The necessary findings on this issue were not made below.

"Requiring government disclosure will not encourage defense counsel to be careless in trial preparation since there can be no assurance that the government, even with all its resources, will discover all significant evidence favorable to the defense. And we do not suggest that the government is required to search for evidence favorable to the accused, or to disclose all its evidence, however insignificant, to the defense.

"The government contends that, since the fact that McCeney and Hooper did not remember the exchange could have been discovered by appellant, the government's failure to disclose it did not violate appellant's rights. Ordinarily, a finding of lack of due diligence will defeat a motion for a new trial based only upon the significance of newly discovered evidence. But appellant's claim for relief based upon a breach of the prosecutor's duty of disclosure challenges the fairness, and therefore the validity, of the proceedings, and relief, either on a motion for a new trial or for habeas corpus, may not depend on whether more able, diligent or fortunate counsel might possibly have come upon the evidence on his own. A criminal trial is not a game of wits between opposing counsel, the cleverer party, or the one with the greater resources, to be the 'winner.'"

In his dissenting opinion Judge Berger had this to say:

> "Presentation of perjured testimony and deliberate suppression of evidence are types of conduct which not only prejudice the defendant but also violate the law, the basic duty of the prosecutor as an officer of the Court, and the very integrity of the judicial process. Such conduct is impermissible. As a result, a showing that the prosecution knowingly suppressed relevant exculpatory evidence automatically entitles the defendant to a new trial, with little or no showing of prejudice.
>
> On the other hand, precisely because a trial is not to be a 'game of wits', the law has always required a showing of due diligence as the precondition to gaining a new trial upon the discovery of any new and relevant evidence which was not within the exclusive control of the prosecution. In short a litigant is not allowed to gain an advantage out of his own slovenly preparation for trial."

The point of difference and departure between the majority and Judge Berger is the question of diligence in preparation. And it is this emphasis that brings the instant case within the sweep of the views of the majority and Judge Berger in the *Levin* case.

It is true that Jones was present in New York, and a subpoena could have been served on him. He was interviewed by the defense and a decision was made not to call him.

But the circumstances justified the decision, and takes the case out of the area complained of by Judge Berger.

In the *Levin* case the witness who was not called had no axe to grind. He was unconcerned in a very real sense.

He had no stake in the outcome. Under no circumstances could his objectivity be open to question. His memory might be faulty. No significance could be attached to that. His recollection could even be contrary to the actual facts. That would be put down to human frailty.

Consider on the other hand the dilemma of the defense.

1. Jones a co-conspirator.
2. Jones a many times convicted criminal.
3. Jones under government subpoena.
4. Jones a "prisoner" of the prosecution.

Could Jones' apparent willingness to testify be trusted?

Granted that a calculated decision was made not to call him, was not the defense justified in relying on the undoubted duty of the prosecution to call him?

The dissent in *Levin* did not question the underlying principles of prosecutional duty. It raised the spectre of uncertain results bottomed on negligent or inefficient counsel for defense.

While Jones was a co-conspirator, a convicted criminal, under government subpoena and in danger of reprisal as "non-cooperative", he was in practical effect unavailable as a witness for whom defense dared to vouch.

It was different with the government. It had the power and the duty to secure the truth from him.

It is clear, is it not, that petitioner on the facts presented by him was entitled to a new trial. Applying the *Levin* principle, it was not material that a witness known to the prosecutor and not used by him to give evidence of possible favor to the defense was equally available to the

defense. Does it not follow that "availability" is not the controlling factor?

It was the theory of the trial judge in this perjury case, echoed by the Court of Appeals that it was crucial to the success of the motion for a new trial that the defense show diligence in securing the evidence now stated to be "newly discovered". The Court of Appeals said:

> "Mittelman contends further that even if the statements be found untrue as used, they were not material to the proceeding in which they were used, his application for new trial. Materiality of the statements was correctly held to be an issue for the court, which held them material. *United States* v. *Siegel,* 263 F. 2d 530, 533 (2d Cir.), cert. denied 359 U. S. 1012 (1959). The claim that they were erroneously held material must be rejected. Even if, as is now claimed, the main thrust of the motion was not newly discovered evidence that Jones would contradict government witnesses Carroll and Holland, but that Jones would testify that he had informed the government of the claimed falsity of Holland's and Carroll's testimony and the government had used it regardless and that Jones had not revealed this to Mittelman until after the trial, the statements would still be material. The court before which the motion was pending would be interested in knowing not only whether Jones had told those details to Mittelman, but whether he was available, whether he talked at all to Mittelman, when and to what extent, so that not only the truth of the statements could be tested, but also Mittelman's diligence in inquiring. Diligence is material on any claim of newly discovered evidence. *United States* v. *Pellegrino,* 273 F. 2d 570 (2d Cir. 1960); *United States*

> v. *Costello,* 255 F. 2d 876, 879 (2d Cir.), cert. denied 357 U. S. 937 (1958); *United States* v. *Abrams,* 357 F. 2d 539, 550 (2d Cir.); cert. denied 384 U. S. 1001 (1960)."

The fact is that petitioner made no averment that he was unaware of Jones. He expressly stated that he met Jones several times during the trial and did not doubt that if he told the truth his evidence would be helpful.

His contention was, when properly defined, that the prosecutor had failed in his duty to call Jones.

The trial judge persisted in arguing to his own satisfaction that petitioner was attempting to claim Jones as "newly discovered". This point will be discussed further under another point of the argument. All that petitioner stated to be newly discovered was Jones' post trial statement that he had on many occasions advised the prosecutor of the lies of Carroll and Holland. A buttressing factor to the previous admissions of the government in its brief in the court of appeals in the Texas-Adams case.

Assuming, *arguendo,* that the statement of Jones' dismissal before the defense began was false, was it material in the context of this case?

Not every falsehood constitutes perjury.

> "The case of United States v. Luzzi, 170 F. Supp. 81 (E. D. Pa. 1959) is in point. There the defendant was convicted of robbery and sentenced to prison for a term of 7½ to 20 years. Having exhausted his state court remedies he filed a petition for habeas corpus in the federal court, averring that his constitutional rights had been violated in his trial. As a result of his testimony in the habeas corpus hearing he was

charged and tried in the federal court for perjury. He was charged with having testified falsely in saying that he personally rather than his counsel asked the questions of the prospective jurors at the time of the robbery trial. There was abundant evidence in the perjury trial to the effect that defendant's statement in the habeas corpus hearing was false when he testified that he personally rather than his counsel asked the questions of prospective jurors. The question before the federal court was whether such testimony was material to any of the issues in the habeas corpus proceeding. In holding that this testimony was not material and therefore could not form the basis for a perjury prosecution under section 1621, the court reasoned:

> 'In the Berks County case defendant was charged with having robbed a garage. At the trial a relative of the garage owner was a member of the jury which convicted defendant. In the habeas corpus case it was defendants' contention that the fact that this interested juror sat in judgment in his case deprived him of his constitutional rights. There was no contention * * * however, that defendant either by himself or through his counsel, was in any way deprived of his right to examine prospective jurors or that there was any interference with his right to examine them. In view of this, it is apparent that whether or not defendant personally asked the questions of the prospective jurors * * * was a question which was immaterial to the issue in the habeas corpus case.' '' At 82.

Also in point is *United States* v. *Laut*, 17 F. R. D. 31 (S. D. N. Y. 1955), where Judge Bicks held that a count which charged in effect that the defendant had falsely stated, in 1961, that all statements he had made at a naturalization hearing in 1950 were true, was insufficient. Judge Bicks held and said:

> "Beyond doubt, Count Two charges no probably material false statement. Alleged only is that defendant in 1951 knowingly lied about the truth of any of his 1950 statements. Since many of defendant's 1950 answers were not then material, lying about the truth of any one of them one year later, during rehearing of the same issue, must likewise be immaterial. * * *" At 35.

The court of appeals concentrated its attention on whether or not petitioner had shown himself diligent in chasing down Jones as a possible witness. It held that the question of whether or not the statement was perjurious was related to the effect on Judge MacMahon.

Again, and we repeat, petitioner's affidavit disclosed his prior talks with Jones and the reason he was undecided whether to call him as a witness.

We suggest that on the facts in the instant case, Judge Berger would agree that "diligence and slovenly preparation was not involved; that what was involved was the integrity and dignity of the United States.

In any event this case calls for a resolution of the conflict in the decisions of two circuit courts.

POINT II

The courts below erred in attributing perjury to a statement which purports to summarize or characterize the statement of another where that statement is attached and subject to be examined and independently evaluated.

In his affidavit in support of his motion, petitioner attempted to summarize and characterize the affidavits of four prospective witnesses who would testify in the event petitioner was given a hearing on the issues raised by his motion.

Subdivision 52 pertained to the Jones affidavit. "The Jones affidavit".

Subdivision 53 pertained to the Jannis affidavit "The Jannis affidavit".

Subdivision 54 pertained to the affidavit of Purcell "The Purcell Affidavit".

Subdivision 55 pertained to the Reed affidavit "The Reed affidavit".

All of these affidavits were attached to the motion papers for a new trial (Gov. Ex. 18).

Co-defendant Jones told a story in his affidavit, the essential details of which were never contradicted or denied by the government. The essentials were that he could prove that Carroll and Holland had lied, and that the government elected to stand by perjury rather than truth —depending on the source and its purpose.

Perjury is attributed to petitioner on the assumption that he had decided to call Jones as a witness, but could not locate him. Passing his grand jury testimony which ex-

plained why he and his associates decided not to call Jones, it is obvious that he never asserted he would call Jones even if he was available.

If we assume for a moment that petitioner had not done more than identify the persons whose names were signed to the supporting affidavits, it is clear that no perjury could have been charged against petitioner. And even Jones' affidavit would have gone unchallenged because all that he said was that he was excused just before the government "rested," an indefinite and vague time because the governmnet "rested" after the defense completed its presentation. It was only by attributing to Jones the interpretation put on his affidavit by petitioner that Jones' affidavit was held to be misleading.

By nit-picking, inference, strained construction and desire to achieve a result is it possible to attribute to petitioner an intent to deceive?

The complete answer is that it was left to Judge MacMahon to read Jones' affidavit and what petitioner said about it.

We have not been able to find a case dealing directly with the question herein raised. There is, however, a line of cases involving tax returns which are applicable. A taxpayer taking a deduction not allowable is not guilty of fraud or perjury if he sets forth so that all may see and read the source of the income or reason for deduction. He may claim a capital gain which is in fact normal income, and he cannot be charged with fraud or perjury if the facts on which he relies are exposed for examination. It is different if he fails to disclose the source of the income so that an examiner may be misled.

In *Lorenzo C. Dilks,* 14 BTA 1294, 1301 it was said:

> "As indicated above, at the time he filed his return for the year 1921 petitioner made a disclosure of the fact that he had received $74,703.94, which he was not returning as income, claiming the same to have been paid him as a gratuity. Though we have held him to be in error in his characterization and treatment of the sum so received, we are of the opinion that the respondent, on whom rested the burden of proof on this issue, has not established fraud. The disclosure, in our judgment, negatives any intention on the part of the petitioner to file a false and fraudulent return with intent to evade tax and, on the contrary, evidences an honesty of belief that the sum received was not taxable. The charge of fraud is disapproved.
>
> *Judgment will be entered under Rule 50."*

In C. C. Cooke, 10 T. C. M. 881, 906 (1950 aff'd 203 F. 2d 258, it was said:

> "• • • The fraud meant is actual, intentional wrongdoing, and the intent required is the specific purpose to evade a tax believed to be owing. • • • " [*Mitchell* v. *Commissioner,* 118 Fed. (2d) 308 [41-1 USTC ¶ 9317].]
>
> "*William W. Kellett,* 5 T. C. 608, 618 [Dec. 14,712].

The failure of petitioner to prove before the Court the existence of a real profit sharing plan and partnership for tax purposes does not require a finding of fraud. More than doubt is required of respondent under the burden he had. *Arthur M. Godwin,* 34 B. T. A. 485 [Dec. 9397]. There was no concealment of the profit sharing plan or the formation of a partnership.

All of the credits, together with shares of profits of the partnership, were fully reported for income

tax purposes, and tend to negative a deliberate purpose to evade taxes. *Lorenzo C. Dilks,* 15 B. T. A. 1294 [Dec. 5040]; *George W. Griffiths,* 37 B. T. A. 314 [Dec. 9949]."

Perjury and fraud are not far apart in concept.

It is difficult to see how either can be found in the face of full disclosure.

POINT III

This court should settle and determine the circumstances and conditions, if any, where it is proper to incorporate in an indictment recitals of a previous criminal offense.

In the case of *United States* v. *Verra,* 203 F. Supp. 87 (S. D. N. Y. 1, 2), Judge Weinfeld said in regard to reference of a prior conviction in an indictment:

> "John Verra's conviction, if permitted to remain in the indictment, could not properly be brought to the jury's attention at the start of the trial, and if the prosecution, in his opening statement to the jury, were read or refer to this allegation, a mistrial would result."

In the instant case no motion to strike was made. It was agreed instead to avoid all references to the prior conviction or the nature of the prior proceeding. But the prosecutor in his opening statement and summation did the very thing Judge Weinfeld said would lead to a mistrial. *Such a motion was made and denied.*

Judge Weinfeld went on to speculate as to other consequences that would result from such disclosure. He said at pp. 89-90:

> "Nor could the conviction against John Verra be established in the Government's direct case. If the jury were to request the indictment during its deliberations, these allegations would have to be excised—certainly if he did not take the stand. It is no answer, as the Government suggests, that the matter be left to the trial judge 'and should he decide at the conclusion of the trial that these allegations should not be submitted to the jury, they may be blocked out.' While it is true that surplusage in an indictment may disregard, the inclusion of the questioned allegations serves no purpose other than possible prejudice to the defendants. An indictment should contain a 'plain, concise and definite written statement of the essential facts constituting the offense charged.' Since the defendant's conviction, sentence and appeal in the earlier case are not essential facts of the crime charged in the current indictment and prejudice may inhere in the allegations, the motion under Rule 7 (d) to strike paragraphs 3H, 3I, 3J and 3K from the indictment is granted." At 89-90.

It is in the very nature of a criminal trial that the indictment comes before the jury. A question arises whether in a perjury case growing out of a prior criminal proceeding it is necessary to so recite the facts that the conviction in the prior case is brought to the attention of the jury.

The very fact that deletions, evasions and euphemisms were resorted to proves that careful draftsmanship could

have avoided the prejudices. The contrivances used to secrete the facts from the jury merely aggravated the situation.

The built-in prejudice could not be overcome by any device, as the trial itself demonstrated. The indictment should have been dismissed.

Nor could the so-called ground rules cure the fatal situation. They were broken, perhaps it was inevitable that this should be so. But petitioner did not create the situation. The situation was created by an indictment inherently and inevitably prejudicial.

The court below commended the trial court for its effort to avoid the prejudice. These efforts failed and merely aggravated the situation.

Nor did the caveats of the Trial Judge to avoid speculation help matters. It is now well understood that such warnings go disregarded. The invitation to speculation was too titillating an exercise.

The Court of Appeals missed the point. The Ground rules were justified as a barrier to prejudice only if observed by the parties and the trial judge. It has no answer that the trial judge continually warned the jury to avoid speculating as to the secret from which it was excluded. It is naive to suppose that the jury would not speculate and would not suspect the truth. The caveat merely served to spice the speculation.

> In *United States* v. *Bozza*, 365 F. 2d 206, 214-218, defendant Jones had given a confession as to the burglaries in question, in which he had named the other appellants as accomplices. The Trial Judge had deleted the names of the other appellants from the confession before receiving it into evidence. In

addition, he had cautioned the Jury to consider the confession only as against the confessor Jones, and not to speculate as to whose names had been deleted. In reversing, because of the failure to grant a severance to each of the appellants when receiving the confession of the defendant Jones, Judge Friendly wrote:

"We do not read Delli Paoli as going so far. Page 216.

"Although in a sense the confession in both cases merely corroborated what the Government had already had established, 352 U. S. at 242, the similarity is more formal than real. Whereas the admission in Delli Paoli was hardly critical to a case already made out by testimony of outside observers, Jones' confession furnished a devastating corroboration of the heavily attacked testimony of an accomplice on which the prosecution almost entirely depended for proof of guilt. This admission by a defendant that Kuhle had worked with him and all the others probably ended whatever chance any of them might have had to find a juror unconvinced of a guilt beyond a reasonable doubt. Indeed, even if the Jury could perform the feat of not speculating over the inserted blanks, Jones' confession of his own association with Kuhle would have a serious spillover effect at least on Mulhearn and Fizzo * * * we therefore cannot regard Delli Paoli as controlling in the Government's favor." Pages 216, 217.

In addition, the violation of the ground rules gave the prosecution the advantage of having its cake and the relish

of eating it. Far better for petitioner had he been able to open wide the gates of evidence. He could have shown

(a) The perjuries used against him in extenuation of his alleged guilt.

(b) That he was incarcerated when he executed his affidavit and under great stress.

(c) That the events referred to covered a relatively remote period, and occurred during the course of a lengthy and complicated trial.

(d) That the decision not to use Jones as a witness was a decision made by experienced counsel for himself and others.

(e) That it was absurd to believe he would deliberately lie about a matter known to so many.

(f) The reasons for not calling Jones in his own defense.

(g) The whole of his affidavit could have been read to the jury without suspicious appearing deletions.

(h) The whole of his grand jury testimony could have been read to the jury with its exculpatory explanations.

In addition, and most important, he could have taken the stand in his own defense because it would already have been known to the jury that Jones and he had criminal records; and that his record was bound to the case being judged by it.

The inherent defects of the indictment were not saved by the ground rules.

POINT IV

This court should determine whether it is proper to join in one indictment defendants whose interests and testimony are in conflict in the absence of any charge of conspiracy, aiding and abetting on plot; and whether where prejudice from joinder far outweighs considerations of alleged convenience to the government from such joinder.

A. When the so-called ground rules were suggested by the trial judge it was not yet known whether the government intended to offer in evidence the transcripts of the grand jury testimony given by petitioner and co-defendant Jones. Access to the Grand Jury testimony was denied despite new Rule 16 (a) as amended CR. 729-731). Petitioner's attorney was unaware of their contents when he reluctantly agreed to the ground rules suggested by the trial judge.

In advance of trial there was sufficient indication of possible conflict as to suggest a motion for severance. This was denied.

But the prosecutor knew that there was a conflict in interest and testimony between petitioner and co-defendant Jones. He must have known that he was gaining an advantage by the agreement if he could get the Grand Jury testimony before the jury. It is our position that it was his duty to disclose to the trial judge and to defense counsel the existence of this conflict the better for them to decide whether the ground rules would secure to petitioner the noble objective desired by the trial judge.

The Government was unfair, with the knowledge it had of the conflict, in effecting the joinder in the indictment, and it aggravated the unfairness by failing to disclose the

trap into which defense counsel fell by agreeing to the ground rules, albeit with misgivings.

A comparison of the grand jury testimony of each defendant discloses the conflict which shoudl have compelled a severance after it was received in evidence. This conflict appears at in the appellant's joint appendix in the Court of Appeals.

To avoid repetition of argument, we respectfully refer this court to Point V of petitioner Jones' application herein for a writ of certiorari heretofore filed in this court.

B. Recognizing that rule 8 (b) of the rules of criminal procedure permits joinder to serve the convenience of the trial court and the parties, it is equally true that rule 14 recognizes the possibility of prejudice in such joinder. The resolution of this problem requires the exercise of discretion and the possibility of abuse.

We take it that where prejudice outweighs convenience, convenience must give way. Each case presents its own special problem. It is our contention that in this case the prejudice was so clear as to require severance.

The law is clear that he who claims prejudice bears the burden of setting forth the prejudicial facts.

1. Convenience is served in a complicated and long case. This case was tried in 3 days with most of the time taken up in colloquy.

2. Convenience is served when a conspiracy is charged involving numerous defendants. In this case the indictment did not charge a conspiracy, plot, scheme or aiding and abetting. There were but two defendants.

3. Convenience is served where the evidence as to each defendant is unchallenged as to each and by each.

4. Prejudice is clear where an accused by reason of joinder loses a right to cross examine a witness. In this case it was impossible for petitioner to call his co-defendant as a witness for any purpose, even if only to introduce him to the jury.

5. Prejudice from joinder is apparent if it puts the defendants in opposition to each other. In the instant case co-defendant Jones has accused petitioner of confessing him into a guilty situation. There was also much conflict in the matter of detail which created a background of intrigue based on speculation.

6. Prejudice from joinder was inherent in the inability of either defendant calling the other without compelling the relevation of prior criminal convictions, precluding clarification of explicable differences.

7. Prejudice was clear in the frustration of showing through Jones suppression of evidence and his dismissal by the prosecution as a witness.

Co-defendant Jones has added his voice to this argument from a point of view somewhat differently, but in our opinion, most cogently. We adopt his reasoning and arguments and respectfully refer the court to his application for further support of this argument.

POINT V

This court should determine whether a trial judge may ignore judicial admissions—statements of position by the parties—having a direct bearing on the issues as presented to the judge on the motion for a new trial.

It is to be observed that the Court of Appeals found the offending sentence material because it would prompt the judge who heard the motion to inquire whether petitioner had been "diligent" in discovering the Jones evidence, thus invoking the rule generally applicable to newly discovered evidence. We discussed this question from a different point of view under a previous Point.

As to the Jones evidence as shown above, petitioner made no claim that it was newly discovered. He expressly stated that it did not meet the generally accepted standards applicable to newly discovered evidence.

And the government in its answering affidavit accepted this concession.

We quote again from the Government's answering papers:

> "14. Actually Mittelman's own papers concede that the facts of this case do not amount in law to newly discovered evidence. (Mittelman affidavit par. 52 at p. 36). Instead, he rests in the final analysis on the contention that the Government was under a duty to call Jones as its witness. It is respectfully submitted that the Government was under no duty to call as a witness and vouch for the credibility of a person with such a criminal record who was a participant in the fraud charge in the indictment. This is particularly so here, where with respect to

> the only two matters of which Mittelman complains that were adduced by the Government, Government counsel also adduced the contradicting testimony."

The trial judge refused to be bound by the issue as submitted by the parties. Despite petitioner's concession that Jones had been available, he insisted that the motion was instinct with the assertion of submission on the exclusive theory of newly discovered evidence.

His remarks in this connection appear at p. 467 *et seq.* of the transcript. Since the transcript was not printed, these remarks appear in the appendix hereto (APP 27a *et seq.*).

It is our position that trial court and the Court of Appeals erred in employing the standards of newly discovered evidence in order to find that the pertinent sentence, out of the context of the whole and the thrust of the motion, was "material".

In *U. S.* v. *Roy Fruehauf, et al.,* Judge Sugarman held in an unreported decision that the government was bound by its assertion that a particular transaction, asserted to be criminal, was a "loan" and as such violated the law respecting transactions between labor leaders and employers having dealings with their unions. He dismissed an indictment on that ground. The U. S. Supreme Court reversed holding that the word "loan" did not necessarily prevent the government from showing that though a "loan" in fact, the terms could be such as to make it partake of aspects of a gift—a fact that had to be tried.

However, there was no criticism of the legal proposition that a straight forward stand constituted a judicial admission and would be binding unless, of course, not a clear statement of position.

But in the instant situation it is clear that both parties agreed that the Jones evidence was not "newly discovered" as a legal fact.

The consequence of this disregard of the agreed theory on which the matter was presented to Judge MacMahon, and upon which his denial of the motion was based—right or wrong—was a forced and ill-founded determination of motive and intent, and, therefore, an improper finding of materiality.

It must finally be emphasized that the jury did not pass and had no opportunity to pass on the question of materiality. The trial judge made the finding, and it is our contention that he erred, and that the court below committed error in sustaining this finding.

CONCLUSION

This court should grant certiorari, the judgment below should be reversed, and the indictment dismissed.

Respectfully submitted,

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MU 9-1114

Excerpts From Government's Exhibit 18 (Petitioner's Affidavit in Support of Motion)

SYNOPSIS OF FACTS NECESSARY FOR THE MOTION

12. *The Texas-Adams Takeover.* On September 27, 1955 Peter Crosby, William J. McCarthy and Worth Pettit, Jr. purchased the controlling block of Texas-Adams stock in the name of American Montana, all of whose stock they owned, and of which they were the officers and directors. The Government presented me as one of the principals in Texas-Adams. This is a false picture. The principals were in fact the three defendants named in Count 1 of the indictment, and Thomas K. Hudson of Denver, Colorado, who was general counsel for the company, and also an officer and director.

In New York the attorneys for Texas-Adams, American Montana and the three count 1 defendants were Messrs. Annenberg & Greene, who acted as counsel in the so-called takeover of control of Texas-Adams. They had been Crosby's attorneys prior to that episode, and continued as counsel for the named parties until some time after November 8, 1955, on which date Crosby resigned as an officer and director of Texas-Adams.

13. Prior to the takeover I had been a member of and counsel to several syndicates formed and headed by McCarthy, who were desirous of purchasing the valuable oil properties of Ajax located in Montana and Wyoming. These efforts failed. None of the work upon which I had been engaged for these syndicates had anything to do with Texas-Adams. But the government maintained that it did. This because when McCarthy and Crosby finally did acquire control of Texas-Adams they attempted to pick up the pieces of the Ajax transaction. The govern-

ment contended that my activities prior to the takeover of Texas-Adams merged into the Texas-Adams scheme to acquire the Ajax properties and motivated my participation in the fraudulent Count 1 scheme even though the Grand Jury did not charge me with it.

Thus at the trial by reason of representations made by government counsel to show connection and motive, the government was permitted to offer a mass of testimony and evidence, known and referred to as the "Homestead" evidence. It is this evidence which it is necessary for me now to synoptisize in order to demonstrate the specifics of the instant motion.

14. *The Homestead Transactions.* As indicated above, I was involved long before the Texas-Adams takeover, in several efforts to acquire the valuable Ajax oil properties on behalf of two separate syndicates. The stockholders of Ajax were willing to accept cash and stock in a well regarded company for the properties owned by Ajax.

In both instances Homestead was a link in a chain of mergers, and was supposed to furnish some of the cash necessary to make a partial downpayment.

The first syndicate proposed to use the stock of Dumont as part of the purchase price. Toward that end, the McCarthy group contracted to purchase control of Dumont, and made agreements to merge Dumont and Homestead, and to purchase the Ajax properties with cash and Dumont stock.

While these negotiations were going forward Homestead deposited $50,000 in a Billings, Montana bank as evidence of financial ability to perform. But though those who

owned the controlling block of Dumont stock had contracted to sell it to McCarthy's group, they withdrew; and the project failed of consummation.

The second syndicate proposed to use the stock of Continental as part of the purchase price. Toward that end McCarthy joined forces with Fassoulis, who had contracted to purchase the controlling block of stock in Continental. Both Homestead and Ajax agreed to the substitution of Continental for Dumont. Homestead agreed to merge with Continental, and Ajax agreed to take cash and Continental stock as the purchase price. In the course of these negotiations Homestead advanced $50,000 and $19,000 in cash, and in a collateral transaction loaned me $90,000 on behalf of the syndicate to purchase 1,800,000 shares of its stock for the purpose of raising additional cash for Homestead. But the Continental deal also failed of consummation.

16. *Texas-Adams and Homestead.* After McCarthy, Crosby and Pettit acquired control of Texas-Adams on September 23, 1955, McCarthy and Pettit went to Denver where they met with Thomas K. Hudson, an attorney for Homestead, and on October 12, 1955 a merger agreement was entered into between Texas-Adams and Homestead, and again an effort, in which I had no interest and in which I did not participate, was made to purchase the Ajax properties. These negotiations were carried on in Denver with counsel for Ajax; but that transaction also failed of consummation.

17. This summarizes the various efforts to acquire the concededly valuable Ajax properties. The government saw in all this a continuing process. This theory led to the

conclusion that I was involved in the Texas-Adams takeover, and, because of alleged derelictions on my part in connection with my representation of the Dumont and Continental syndicates, I had ulterior motives for joining the McCarthy-Crosby combine in all of its operations and activities.

Against this background the perjuries of Holland and Carroll become crucial to me, as did also the perjury of Kimmes. Jones's affidavit bears on the perjuries of Holland and Carroll, and my affidavit demonstrates the perjury committed by Kimmes.

18. *Carroll's perjuries known to be such by government.* It was part of the government's theory of the case that I knew all about the proposed Texas-Adams takeover before it took place on September 27, 1955; that I had misused and/or misappropriated a total of $159,000.00 of funds belonging to Homestead during the ill-fated Dumont and Continental efforts to acquire the Ajax properties; that I had wrongfully appropriated to myself shares of Homestead stock; that on the negotiations and transactions with Homestead, I was acting solely on behalf of a restricted McCarthy group which did not include Homestead and its promotors (Holland, Carroll, Jones, et al.); that to cover my derelictions with regard to Homestead I continued along with the McCarthy-Crosby Texas-Adams agenda of plans and operations. Carroll's testimony was offered in partial support of this theory.

19. Carroll perjured himself in the following material particulars:

(a) That on three occasions prior to the Texas-Adams takeover on September 27, 1956, McCarthy in my presence

and/or I allegedly told him that Texas-Adams might possibly be used to merge with Homestead, to wit, in June, July and finally on August 8, 9 or 10, 1955.

(b) That I allegedly arranged the temporary one-day $90,000 loan with which I purchased the 1,800,000 shares of Homestead stock.

(c) That Homestead allegedly was not a member of the syndicate acting to acquire the Ajax properties.

(d) That his firm allegedly did not pay me $1,000 as part payment of legal fees for services rendered to the syndicate.

20. A crucial point in the so-called Homestead evidence was whether or not I knew anything of, or participated with McCarthy and Crosby in the fraudulent takeover of control of, Texas-Adams. Carroll testified concerning this.

He testified that in the middle of July, McCarthy claimed control of Texas-Adams in my presence (J. A. 518a-20); that on July 22, 1955 in Denver McCarthy and I both claimed such control (J. A. 523-24a); and that on August 8, 9 or 10, 1955 I told Carroll that the most likely corporate vehicle to be used for merging with Homestead was Texas-Adams (J. A. 526a-27a)—testimony designed to link me with knowledge of and participation in the fraudulent Count 1 scheme.

21. Many days later another government witness, Rosen, testified: that he and Crosby placed an advertisement in the Wall Street Journal on August 9, 1955, seeking control of a public company; that he received a reply from the broker defendants; and that he and Crosby conferred

with them thereafter regarding purchase of their controlling block of Texas-Adams shares (J. A. 1337a-40a; 1352a-3a; Goldberg, R. and G. Ex. 18).

22. The prosecutor himself referred to that advertisement as "*The one that led to Texas-Adams*" (J. A. 1337a). Moreover, Rosen had been subjected to intensive interrogation before the trial (J. A. 1354a-57a); and the prosecutor obviously knew the facts regarding that advertisement, and the events it set in train, before Carroll testified.

It is therefore plain: that Carroll's testimony about conversations with me and in his presence regarding Texas-Adams long before Crosby's first meeting with the broker defendants, was necessarily false; and that the prosecutor knew it was false when he adduced it. But I do not rely on inferences, however, conclusive.

In response to my brief in the Court of Appeals, which demonstrated the falsity of that testimony and its conscious use, the government's answering brief conceded that "*Carroll's testimony that Texas-Adams was mentioned at the July 22 meeting was unquestionably wrong*"; and it added in a related footnote: "There is, of course, no way of knowing whether Carroll's recollection was in error *or whether he wilfully perjured himself.*" (pp. 223-23; emphasis supplied). But it claimed absolution for offering it on the ground that the government itself proved he was mistaken through Holland's prior testimony "that only Dumont was mentioned at that meeting and that Texas-Adam's name did not come up until mid-September (J. A. 336a-37a, 348a)" (*id.*). If Holland had given such testimony, it could not excuse a deliberate offer of contradictory testimony which the prosecutor knew was false.

Excerpts From Government's Exhibit 18

But even the excuse itself was false: the government's cited references to the record did not support, nor does the record elsewhere, its claim respecting Holland's testimony; and it ignored the fact that Holland was not present at the earlier meeting in New York in mid-July. (J. A. 518a) and therefore could not contradict Carroll's testimony about that meeting, and it was completely silent as to the August meeting.

23. The government also asserted in its answering brief there that it would have been "grossly improper" to prevent Carroll "from testifying to what was his recollection", and that it "had no choice but to permit Carroll to testify as his recollection dictated"—although, concededly, it had "no way of knowing whether Carroll's recollection was in error or whether he wilfully perjured himself" (p. 223).

24. The proposition that the government is under a duty to adduce false and prejudicial testimony at the behest of a witness it knows is either mistaken or perjurious, is palpably indefensible. But assuming its validity *arguendo*, its necessary corollary is a duty to disavow such testimony before the jury. There was no such disavowal by the prosecutor in summation or elsewhere.

25. To remove any last vestige of doubt that the government knew or should have known that Carroll was lying when he brought in the name of Texas-Adams in my presence in July and August 1955, there is the accompanying affidavit of Jones wherein he swears not only that the statement of Carroll bringing in the name of Texas-Adams on July 22 in Denver was false, but also that he told the government attorneys it was false.

Excerpts From Government's Exhibit 18

26. Carroll also lied with respect to another very important issue in the case.

For whom was I acting? My defense was that with respect to all the moneys I received from Homestead—the $50,000, the $19,000 and the $90,000 loan (totalling $159,000.00)—I was acting for a syndicate of which Homestead and the Jones group were members.

On August 10, 1955 I purchased 1,800,000 shares of Homestead stock for 5¢ a share. The purpose was to complete the public sale of the Homestead stock sold under a Regulation A exemption. Jones and Fassoulis, members of the syndicate, had stated that they could sell these shares in Birmingham, where Jones resided, and in New York. Carroll had been unable to sell the entire issue in Denver. The $90,000 to be realized from the public sale of the stock would then be used by Homestead for syndicate purposes (J.A. 1740-1740a).

The mechanics were as follows: I made a temporary one-day loan aggregating $90,000. I then purchased the stock from Homestead, which put Homestead in funds. Homestead then loaned me the $90,000 which I then used to repay the temporary loans (J.A. 538a-9a, 559a-63a).

In testifying Carroll, admitted familiarity with the transaction but sought to make it appear that I had engineered it on my own behalf.

But on cross examination Carroll wavered. He admitted that I had borrowed $50,000 from one Gold, and that he, Carroll, knew about it (J.A. 560a-1a). He admitted that his own firm had loaned me the additional $40,000 (J. 561a). He finally but reluctantly admitted that Gold was his

partner (J.A. 538a). It must be obvious, therefore, that it was Carroll who arranged the temporary loans. He refused to admit that I was representing a syndicate of which he, Homestead, Jones and others were members. He did say that I was acting for the McCarthy group (J.A. 866a). He denied being a member of that group (J.A. 866a) or of any syndicate for which I was acting as attorney (J.A. 866a).

But he was shown the bottom half of a voucher form of check which he identified as his firm's (J.A. 867a). It showed that it had been a part of a check bearing the number 2386 (M-EX 13). Typewritten on it was the following legend: "Syndicate expenses—legal fees—$1,000." (J.A. 868a). He said then that he could not recall to whom the check had been issued nor the date of issuance. He said he could not remember whether it had been paid to me for services to the syndicate (J.A. 868a).

Thus the matter was left, and the government did nothing to help the defense, though it had at hand the means to learn the truth. Carroll had testified that all of the firm's books and records had been destroyed at his instance, and he had no way of checking the facts. They had been destroyed about a year before the trial (J.A. 867a) at the very time Texas-Adams was the subject of investigation by the Attorney General of the State of New York, the government, and the trustee in bankruptcy of Texas-Adams (J.A. 552a.)

27. Long after Carroll had left the stand and departed for Denver, I was able, through Carroll's bank, to obtain a photostat of the check itself. It showed me as the payee of the $1,000 check and the date as August 10, 1955, the

very day I purchased the 1,800,000 shares of stock and the day I borrowed the $90,000 from Homestead.

Carroll had lied about Homestead participation in the syndicate for which I had been acting.

28. Had the facts favorable to me been disclosed by the government, the jury could not have been misled by any assertion that I had misappropriated 1,800,000 shares of Texas-Adams stock, or any money. It would have been clear that I was acting for a legitimate group of people who wanted to acquire the valuable Ajax properties in a completely legal manner. My role as attorney and agent for the group would then have been clearly disclosed, and there would have been no inference that I had acted independently for any benefit of my own.

29. Jones could have set the entire matter straight. The government attorneys knew the facts from Jones, and what Jones told them could easily have been checked. But the government kept Jones in readiness as a witness for weeks at a time, and then suddenly shipped him off, thus suppressing the evidence that would have disclosed beyond any question that I had not misappropriated shares of Homestead stock and that all my actions were on behalf of the McCarthy-Fassoulis interests on the one hand and the Homestead-Jones interests on the other. In short, I had nothing to hide about my relationship to and in my dealings with Homestead a—fact which would have shattered the government's theory.

30. *Holland's perjuries known to be such by the government.* It was part of the government's theory of the case,

as I indicated above (and I repeat it now to focus attention on Holland), that I misappropriated to my own use $19,000 in cash of Homestead's funds; that I abused a trust with regard to $50,000 of Homestead's funds; that I procured a loan of $90,000 from Homestead in order to purchase 1,800,000 shares of its stock without the knowledge of Holland, its president; and that this misconduct led me into further frauds with McCarthy and Crosby in an effort to conceal these misfeasances and malfeasances. Holland's testimony was proffered in support of this theory.

31. Holland perjured himself in the following material particulars:

(a) As to the alleged assertion that I stole $19,000 of Homestead's funds.

(b) As to the alleged assertion that I misused $50,000 of Homestead's money.

(c) As to the alleged assertion that I borrowed $90,000 from Homestead without his knowledge.

(d) As to the alleged assertion that he did not know I used the $90,000 to purchase 1,800,000 of Homestead stock for the syndicate of which Homestead was itself a member. (He also perjured himself as to an important collateral issue, and thus exposed his lack of credibility on any score.)

(e) That he had only a casual acquaintance with Paul R. Jones.

(f) That he had never done any business with Paul R. Jones.

Excerpts From Government's Exhibit 18

(g) That he did not know the principals behind the Jay Cee Trading Company.

(h) That he did not know that Jay Cee Trading Company was the tenant of the premises occupied by him, and that he was a subtenant who paid no rent.

32. It was important for my defense to show that Jones and Carroll were the real promoters of Homestead, and that Holland was only a "front for their activities.

As Homestead's president, Holland was under fire (J.A. 458a) at the time of his testimony. Bankruptcy proceedings were pending in Denver, Holland's home town, where many of the Homestead stockholders lived. In addition, Texas-Adams was bankrupt, and Holland was trying to save himself from a possible lawsuit by the trustee in bankruptcy of Texas-Adams for misfeasance and malfeasance in the handling of Homestead's funds.

33. Holland's attempt to cover himself led him to tell big and little lies. Thus Holland falsely denied that Jones occupied an office or even had a desk in the suite that Holland also occupied (J.A. 384a)—a denial subsequently flatly contradicted by Carroll. Now Jones in an accompanying affidavit swears that he told the government attorneys that Holland way lying. Holland denied that he had ever dealt with Jones (J.A. 450a), a denial contradicted by Exhibit M6, which was executed by Holland and by Jones. Now Jones in an accompanying affidavit swears that he told the government attorneys that Holland was lying. Holland swore before the grand jury that the $50,000 which Homestead had advanced in connection with the Ajax deal, had been transmitted to me as a trustee

through the Chemical Corn Exchange Bank, and that daily demands for repayment followed his discovery that they were no longer on deposit there, although he alone had directed the transmittal of those funds for the Continental deal (J.A. 480a). This involved the purchase of the controlling block of stock of Continental Car-Na-Var, a corporation listed on the American Stock Exchange, whose stock was to be used as part of the purchase price of the Ajax properties.

34. But more important and vital to my defense was Holland's denial that he knew anything about Homestead's loan to me of $90,000 in order to purchase 1,800,000 shares of Homestead stock for syndicate purposes (J.A. 351a). (The government in its opening to the jury and in its trial memorandum to the Court promised to prove that I had obtained 1,800,000 shares of Homestead stock under circumstances which amounted to larceny. It was important therefore for the government to attempt to show that I had tricked Homestead by by-pasing Holland, its president.) But the government knew at all times that Holland was lying in this regard. Not only had Carroll told them that Holland was present at the time that the $90,000 deal was arranged (J.A. 561a); but also they had Jones's statements that Holland had called him from Denver to advise him that Carroll had made the arrangements for me to close out the Homestead deal on behalf of the syndicate and that he, Jones, had told Holland to send me to Birmingham where he, Jones was sure he could dispose of the bulk of the stock. Now Jones in an accompanying affidavit swears that he told the government attorneys that Holland was lying.

35. All this evidence was suppressed even though the government knew that Holland had testified falsely in view

of Carroll's testimony with regard to the matter, and Jones's repeated statements to them. Had the jury been shown the true picture of what had happened, the sting of a larceny charge against me would have been removed from the case. It would have been clearly disclosed that I had acted in good faith with regard to the 1,800,000 shares of Homestead stock, all of which had been restored to McCarthy and Hudson for Texas-Adams.

This single instance was one of the main props upon which the government based its charges against me. But the testimony of Holland that he knew nothing of the $90,000 loan and my purchase of the 1,800,000 shares of Homestead stock on behalf of the syndicate of which Homestead was a member, until he learned of it in New York on September 15 at the St. Moritz "showdown" conference was false; Jones told the government times without number that Holland was a liar as to this; and the government had the means at hand in the subpoenaed witness Jones, in Carroll's testimony and in documentary evidence in its possession to exonerate me of any charge of fraud in this matter.

36. *An extremely prejudicial charge against me was that I stole $19,000 from Homestead.* In his opening to the jury the government prosecutor said that in the Homestead transaction I reaped a wrongful profit of Homestead stock and $19,000 (J. 143a-5a). But William Branch, the lawyer who, acting for Homestead, wired the funds to me, knew at the time that they were to be used to forward the acquisition of control of Continental Car-Na-Var by Fassoulis. $15,000 was immediately paid to Matthew Fox to repay him in part for advances made in furtherance of the purchase of control (J.A. 1753a), and $4,000 was allowed to me on account for my services to the syndicate (J.A. 1756a-7a).

Excerpts From Government's Exhibit 18

37. Holland denied all knowledge of this. He said he did not know of it until some time in September. Then the government argued that the charge against me of larceny with respect to these funds established a motive for my participation in the Count 1 scheme. But Jones was prepared to testify that Holland knew all about the $19,000 long before September and indeed knew about it at the very time Branch had the money wired to me. That Holland knew about the $19,000 before he came to New York is apparent because Hudson knew about it according to Holland, when • • •

• • •

• • • continuing to have it appear that these funds were under my control.

41. Holland's perjuries were numerous and prejudicial. Had the truth, which was known to the government, not been suppressed, as Jones's affidavit shows, the jury would not have been left wondering about the allegedly stolen Homestead shares, the allegedly misappropriated $19,000, the allegedly misused $50,000, and any possible fear I might have had as to criminal liability for my conduct as furnishing a motive and intent for my subsequent conduct.

42. *Kimmes' Perjury.* It was the government's theory that I knew that McCarthy, Kimmes and others had concocted a scheme to rig the market in Texas-Adams stock, and that the participating brokers were to receive Texas-Adams stock as a bonus for their efforts. Kimmes' testimony was offered to support this theory.

43. Kimmes perjured himself in the following material particulars:

Excerpts From Government's Exhibit 18

(a) That I attended the February 23, 1956 meeting at the St. Moritz Hotel at which time I gave him certain particulars regarding Texas-Adams and the marketability of certain shares of its stock.

(b) That I attended a meeting in Denver on March 20, 1956, at which time McCarthy turned over shares of stock to him as escrowee in connection with the market rigging operation.

• • •

56. Where fundamental and constitutional rights have been invaded or denied, it is not necessary to prove prejudice—so the cases hold. But I have proved prejudice. I was prejudiced by the government's contentions established by perjured testimony and/or the suppression of evidence with respect to the following:

(a) that I stole $19,000 of Homestead funds;

(b) that I misused and misapplied $50,000 of Homestead funds;

(c) that I acquired Homestead shares without consideration;

(d) that I had dealings with Jannis after I had learned of the deception practiced on me by Crosby;

(e) that I participated in the market rigging scheme of McCarthy and the brokers;

(f) that I misled Purcell in the Empire transaction as to the purpose of the S. E. C. meeting in Denver;

(g) that Crosby was my partner in the pre-Texas-Adams takeover transactions;

Excerpts From Government's Exhibit 18

(h) that I had knowledge of the McCarthy-Crosby-Pettit joint venture into Texas-Adams long before it took place.

57. I believe that by my affidavit, and those of Jones, Jannis, Reed and Purcell, I have shown that Holland, Carroll and Kimmes committed perjuryffl that Miller was mistaken about the date of our meeting; that I did not deliberately mislead Purcell; and that I was indeed hornswoggled by my clients. If, as the Court of Appeals said, "some apparently damning testimony has been convincingly explained away" by me, and if my innocence rests on the hypothesis referred to in paragraph 8 of my affidavit, then I believe I can rightfully say the testimony which will be given by affiants on this motion will establish my innocence. I believe that these affidavits meet the challenge of the Court of Appeals, and that the testimony at the hearing on this motion, and on a new trial, will convincingly explain away all the damning testimony on which the government relied.

58. In any event, the interest of justice compels the granting of this motion. It is unthinkable that a conviction based on the knowing use of perjurious testimony and suppressed evidence, followed by a severe sentence, should be allowed to stand.

LEO B. MITTELMAN

Sworn to before me this
15 day of May, 1962.

HOWARD E. FRANCISCUS,
Howard E. Franciscus, Parole Officer
Federal Detention Headquarters
New York, 14, N. Y.

Affidavit of Co-defendant Jones (Submitted With Government's Exhibit 18)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

against

FRANCIS PETER CROSBY, et al.,

Defendants.

State of New York
County of New York—ss.:

PAUL R. JONES, being duly sworn deposes and says:

1. I reside in Birmingham, Alabama.

2. I am making this affidavit at the request of Leo B. Mittelman, and I have been advised that he intends to use it in connection with a motion for a new trial.

3. At his request I have read the transcript of testimony given by Robert E. Holland and Howard P. Carroll at the trial of the instant prosecution.

4. I was named as a co-conspirator in the case. I was never called before the Grand Jury. However, I was inter-

viewed by post inspectors in Charlotte, North Carolina, and was interviewed on numerous occasions by the government attorneys in New York City both before and during the trial. I was under subpoena to appear at the trial. I was in New York for many weeks during the trial waiting to testify. At the last moment and just before the government rested its case, I was advised that I would not be used by the government as a witness and it was suggested that I leave town.

5. The government told me about 5:00 o'clock in the evening that it was not going to use me. That same evening my wife and I packed and we left New York City in my automobile, and we started travelling. The first night we stayed in Maryland; from Maryland we went on to Washington, D. C., where we stayed several days. Then we continued our travelling by automobile to North Carolina and from there to Texas. This travelling by automobile from New York City to Texas took some three weeks. During this period it would have been impossible for any one other than those whom I telephoned to locate me and needless to say, I did not telephone Mr. Mittelman or any of the other defendants in the instant case.

6. A great deal of the testimony of Carroll and Holland in the instant trial was false. I make this statement of my personal knowledge and I add that I advised the government attorneys that much of their testimony was false, and in ensuing portions of this affidavit I will refer to specific of their statements which I told government attorneys were false.

7. Carroll testified that at a meeting in Denver on July 22, 1955 McCarthy and Mr. Mittelman "discussed

• • • the merger of Homestead into one of the McCarthy companies" and named Texas-Adams as one of those companies (J.A. 523a-24a). This statement is false. I was present in Denver at that time, and I can say that there was no mention then of Texas-Adams. I was not advised of Texas-Adams until on or about November 1, 1955 when Thomas K. Hudson, who is named as a co-conspirator but not a defendant in the instant case, told me about it when he came to see me on a visit to Birmingham, Alabama.

8. Before coming to Birmingham, Alabama, on this occasion Hudson telephoned me to tell me that he was coming, and that he wanted to visit me in connection with some business matters involving a substantial corporation in which he had an interest and which he would control. When Hudson got to Birmingham this substantial corporation turned out to be Texas-Adams. He briefed me on his relationship to Texas-Adams. He told me that he had become associated with William J. McCarthy and others, and that he believed that under his guidance this company could be made into a tremendously profitable venture. In the course of the discussion the name of Mr. Mittelman came up, and he told me that Mr. Mittelman was no longer associated with the enterprise. He told me that the McCarthy group consisted of Messrs. McCarthy, Crosby and Pettit.

9. The discussions between Hudson and me began at my home and continued far into the night at a suite at the Dinkler-Tutwiler Hotel in Birmingham. At the meetings at the hotel, McCarthy, Crosby and Pettit joined the discussions as well as E. W. Sterling Graham, named as a co-conspirator but not a defendant in the instant case and

Leslie Allenstein. In these further discussions, which continued on November 2, the name of Mr. Mittelman came up again. This time McCarthy told me that Mr. Mittelman was not associated with him any longer.

10. During the trial of the instant case I was here under subpoena by the government for a period of some five weeks. Every evening at 4:30 on instructions from the government I reported at the United States District Attorney's Office at Foley Square. Repeatedly on these occasions I told the government attorneys that Carroll and Holland who preceded him were lying.

11. Carroll and I had the Jay Cee Trading Corporation, a Colorado corporation. I was the Jay and Carroll was the Cee. This corporation occupied premises in the Farmer Union Building, Denver, Colorado. Carroll and I organized this corporation at his suggestion. Immediately after Carroll and I had organized the Jay Cee Trading Corp. we moved Holland and another lawyer by the name of William Branch into the premises of Jay Cee Trading Corp. Holland paid no rent for the premises which he occupied and he was at my beck and call for such services as I required.

12. Shortly after the organization of Jay Cee Trading Corp., Carroll, Branch and I caused the organization of the Homestead Oil & Uranium Corporation (Homestead). I asked Holland to become the president of Homestead because he was a member of the State Legislature of Colorado, and his father was a Supreme Court Judge there. I put up, and Holland knew this, the $10,000. which represented the first deposit into the Homestead account.

After all, Holland was president of this company. When Holland testified that he had no business dealings with me he lied. When Holland disclaimed knowing that I had an office in the same suite in which he had one, he not only told a lie, but he told a big lie. This was a deliberately big lie. I had the big, the elaborate office in that suite. The name Jay Ce Trading Corporation was the top name on the entrance door. Furthermore, my daughter was employed as confidential secretary to the Jay Cee Trading Corporation for a period of months. When Holland disclaimed knowing that I lived in Birmingham he lied. When Holland testified that he knew nothing about the $90,000 loan to Mittelman, he lied. It was Holland himself who called me in Birmingham in August to discuss this matter. When Holland testified that he knew nothing about the organization of Sundown of Colorado he lied. I was present in the office, as was Holland, at the time that Mr. Branch drew the incorporation papers. The company was organized specifically to close the Ajax deal, which Holland well knew. I became an incorporator of the company at his suggestion. Mr. Branch, at my suggestion, paid the disbursements for the organization of the corporation.

13. I told the government about all these lies of Holland. I told the government attorney that Holland was not only a liar, but also that he was a big liar.

14. I was connected with various other transactions as to which the government introduced evidence in the instant prosecution: Longview; Osage; American Montana; Tailorcraft; and Warrior. My connections in all these transactions were with McCarthy, Crosby, Pettit, Hudson and Meredith. They were not with Mr. Mittelman. I know of

my own knowledge, and so advised the government, that Mr. Mittelman had no connection whatever with these matters and that the attorneys who were involved in them were Hudson in Denver, and Annenberg & Greene in New York, who I was informed, were the attorneys for the Crosby-McCarthy group.

PAUL R. JONES

(Sworn to by Paul R. Jones, April 2, 1962)

Excerpts From Affidavit in Opposition to Motion (Mittelman's Exhibit B)

• • •

The Homestead Evidence and the Jones Affidavit.

6. Mittelman asserts, as he did unsuccessfully on appeal, that in connection with the evidence concerning the Homestead Oil and Uranium Co., Government counsel knowingly adduced perjured testimony by the witnesses Holland and Carroll. This claim rests on two false assumptions:

a) That, since Jones would allegedly contradict some of their testimony, they necessarily lied; and

b) That, since Jones allegedly told Government counsel that he would contradict their testimony, Government counsel was bound to believe Jones and thus knew that they lied.

7. It should be noted at the very outset that Mittelman's papers do not contain affidavits by Holland and Carroll recanting their trial testimony. All that we have is the affidavit of a third party who allegedly would con-

tradict some of their testimony. Had Jones so testified at trial it would have been for the jury to decide who was telling the truth. Certainly, at this late point, there is no reason to assume that Holland and Carroll lied merely because Jones says so.

8. Even assuming that Jones so advised Government counsel before trial, the Government was not obliged to take Jones' word against that of Holland and Carroll. Government counsel were familiar with Jones' extensive criminal record, which includes convictions for first degree murder for which he received a life sentence, wartime violation of the O. P. A. Ration Act, vagrancy, bribery for which he received 3 years in prison and conspiracy to conceal narcotics for which he received 5 years in prison, and had good reason to accept Holland and Carroll's testimony as against that of Jones. Indeed, Mittelman himself in his brief on appeal characterized Jones as "shadowy" (P. 49), an "unscrupulous scoundrel" (P. 52) and "the author of the nefarious Osage Scheme" (P. 52 n. 62). Thus, at best, the issue boiled down to nothing more than a conflict of testimony between two witnesses of unblemished reputation and a convicted murderer, briber and narcotics dealer who had been named in the indictment as a conspirator. The contention that by rejecting Jones' version in favor of Holland and Carroll Government counsel "knowingly used perjurious testimony" is as scandalous as it is absurd.

9. Mittelman specifies four instances in which Carroll allegedly committed perjury and eight instances of claimed perjury by Holland. It should be noted in the first instance that almost all of these alleged perjuries were matters raised not in these witnesses' direct testimony but rather their cross-examination. (See particularly the Government's supplemental Brief on appeal, pp. 1-12

where the Government replied to these identical accusations. The Court of Appeals found that "any direct or veiled charge of actual misconduct leveled against the Government's attorneys is wholly without substance." 294 F. 2d at 943) It is difficult to understand how Government counsel can be accused of having "knowingly used perjurious testimony" when defense counsel, not Government counsel, asked the questions that elicited the allegedly perjurious testimony.

10. The only two matters complained of which were adduced on direct examination are Holland's testimony that he did not know about Homestead's advance of $90,000 to Mittelman until September, and Carroll's testimony that Texas Adams had been mentioned as the possible vehicle for merger at the July meetings. In this connection, the following considerations are dispositive of the case:

a) Both of these issues were raised by Mittelman on his direct appeal (Brief, pp. 25-26-69) and were rejected by the Court of Appeals:

b) The Government did not reply on this allegedly perjurious testimony at trial. Indeed, it expressly rejected Carroll's testimony in its Trial Memorandum. If Mittelman wanted a more express rejection of this testimony, he should have asked for it.;

c) It was the Government that adduced evidence at trial which contradicted Holland and Carroll on these two points.

11. Mittelman contends that the Government deliberately adduced these alleged perjuries to make it appear that Texas Adams was in the picture at an early date and that he bypassed Holland in the $90,000 transaction. Nowhere does he point to a single instance in which the prosecution

made such arguments to the jury. Indeed, in its Trial Memorandum, the Government twice expressly rejected Carroll's version of when Texas Adams came into the picture. (See the reprint of the Trial Memorandum in the appendix to Mittleman's brief on appeal. P iii par. 5, and p. vii first par third sentence).

12. Moreover, it was the Government that adduced Carroll's testimony that Holland *had* participated in the decision to advance the $90,000 (R 1980, 1984) It also was clear throughout the trial, from testimony adduced by the Government, that Texas Adams did not enter the picture until at least after the begnining of August. Holland testified that Dumont was the proposed vehicle for the merger at the July 22 meeting (R 1404-05). His first reference to Texas Adams was with respect to the September meeting. (R 1440). And Rosen testified that Texas Adams was found as the result of the advertisement placed in the Wall Street Journal in August (R 5169-72) Thus, the Government is accused of suppressing evidence which it actually adduced at trial. And, further, to the extent that Jones would contradict the alleged perjuries, his proposed testimony would at best be cumulative.

13. The second leg of Mittelman's motion is based on so-called newly discovered evidence. It is axiomatic that on a motion for a new trial, the movant must allege facts showing that a diligent attempt was made to secure this evidence before or during the trial. Mittelman alleges that Jones was unavailable since he was traveling in the Southwest while the defense was being presented. The Court will note that the trial record is completely barren of any attempt by Mittelman to ascertain Jones' whereabouts or any request for a continuance to locate him.

• • •

Excerpts From Trial Judge's Comments on Newly Discovered Evidence as Basis of Motion (S. M. pp. 467, et seq.)

• • •

"The notice of motion is for a new trial under Rule 33 of the Federal Rules of Criminal Procedure and 28 USC, Section 2255.

The next sheet, signed by Mr. Rogge, is headed:

> "Motion for a new trial under 33 and 28 USC 2255.
>
> "Now comes the defendant, Leo B. Mittelman, by his attorney, O. John Rogge, and moves the Court, pursuant to Rule 33 of the Federal Rules of Criminal Procedure and 28 USC 2255 for a new trial in the interest of justice, because of newly discovered evidence, and because this newly discovered evidence also shows that the Government prosecutors, in an excess of zeal, systematically suppressed evidence favorable to this defendant. O. John Rogge, Attorney for Leo B. Mittelman."

The next paper is the affidavit of Leo B. Mittelman, consisting of 58 numbered paragraphs and covering 41 pages, sworn to May 15, 1962. I shall not read the affidavit in its entirety. I shall read, however, Paragraph 1 of Mittelman's affidavit.

> "1. I am one of the defendants in this case and make this affidavit in support of my motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure and 28 United States Code, Section 2255, in the interest of justice and because of newly-discovered evidence which shows suppression of evidence by the Government as well."

In Paragraph 10 of Mittelman's affidavit, the following language appears:

Excerpts From Trial Judge's Comments

"10. For a proper understanding of the force of the newly-discovered and suppressed evidence * * *"

In Paragraph 29 of the Mittelman affidavit, the following statement appears:

"Jones could have set the entire matter straight. The Government attorneys knew the facts from Jones, and what Jones told them could easily have been checked. But the Government kept Jones in readiness weeks at a time, and then suddenly shipped him off, thus suppressing the evidence that would have disclosed that I had not misappropriated shares of Homestead stock."

* * *

The Court: Paragraph 51 of the Mittelman affidavit contains the following language:

"The new evidence relates directly to material matters which represented the bones of the Government framework in the case against me."

Paragraph 52 of the Mittelman affidavit actually consists of a number of paragraphs. The last paragraph on page 35 of the Mittelman affidavit, there are three additional full paragraphs on page 36 and a run-over paragraph on pages 36 to 37 of the Mittelman affidavit.

* * *

On page 36 of the Mittelman affidavit, in one of the paragraphs following the paragraph quoted in the indictment, Mr. Mittelman says:

"I always knew that if Jones told the truth he could prove that Holland, Carroll and his former partner, Graham, were consumate liars. In a sense, therefore, while I could not know all the facts to which he could give answers, I knew that if he told the truth he could not hurt me.

Excerpts From Trial Judge's Comments

"I did not know, however, what he later told me when I met him by chance in New York, some months ago, but time after time he had demonstrated to the Government attorneys that Carroll and Holland had been lying."

The date of Mittelman's affidavit, as already noted several times, is May 15, 1962, so the expression "some months ago" means the early part of 1962.

• • •

The Court: The present motion papers, that is, the motion papers for a new trial, were May 14, 1962. The Court wants to know whether Mr. Baer objects to the receipt in evidence of Exhibit C for identification, which Mr. Rogge says is a copy of his brief.

Mr. Baer: Well, I do, your Honor, but I won't press it.
The Court: Do you make an objection?
Mr. Baer: Yes sir.
The Court: I sustain the objection.

I have read the brief from cover to cover. I am familiar with the cases cited therein and I sustain the objection on the ground that it has no pertinency to the issue. I have to decide, namely, whether or not the affidavits of Mr. Mittelman and Mr. Jones, which are the subject of the indictment on trial, are "material" within the meaning of Section 1621 of the perjury statute.

• • •

Mr. Wales: I wish to be heard on this matter, since this is a joint presentation by both defendants, Jones and Mittelman.

The legal standard for a Rule 33 motion, your Honor, and the legal standard for a 2255 motion are substantially different, and that is what causes this problem of materiality.

Excerpts From Trial Judge's Comments

In order for a motion for a new trial under Rule 33, No. 1, is a standard of newly-discovered evidence, and, No. 2, is that it doesn't assess the matter of credibility. The standard under Rule 2255 is one of Constitutional dimension and which goes to the fairness of the trial. The Supreme Court has held in Maryland vs Brady and other cases that suppression does go towards the concept of due process and affects the very integrity of a fair trial.

Now, the thrust of this motion was directed towards suppression, and therefore, it is directed towards the legal standard of 2255 and not 33.

Now, Arnold Enker, a very astute man, who is a law professor now at Minnesota, well understood this position, and in his position, which I think estops the Government from arguing otherwise, he takes the position that this is a 2255 motion, and there is more than enough in the record for the trial judge to say there was not a suppression, so the motion is denied on that score.

Now, the Government puts the defendant Mittelman especially, but also Jones, who also has the right to raise this issue, the Government wants its cake and wants to eat it, too. It defeats Mittelman's motion under 2255 on the theory, well, this is a 2255 motion, and the record does not substantiate suppression, and we don't have to be concerned with newly-discovered evidence, because it is not really raised. Then, it indicts Mittelman and says, but this is a motion for newly-discovered evidence, and, therefore, he has to pay the consequences for that, too. The Government wants it both ways.

At one time, it is not newly-discovered evidence, and now it is newly-discovered evidence. I say, your Honor, that the Government's position, through Mr. Enker, * * *"

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 135

PAUL R. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

No. 223

LEO B. MITTELMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (J. Pet. App. A; 3 R. 136a–146a) [1] is reported at 374 F. 2d 414.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1967 (3 R. 147a–148a). Petitions for rehear-

[1] "J. Pet." refers to Jones' petition for a writ of certiorari, "M. Pet." to Mittelman's. The printed record is in three volumes ("R." preceded by the volume number), consisting of the appendices to the briefs in the court of appeals and the proceedings in that court. "Tr." refers to the original transcript of record.

ing (3 R. 149a–157a, 158a-187a) and a supplemental petition by petitioner Jones for rehearing (3 R. 201a–215a) were denied on April 6, 1967 (3 R. 227a–228a). Jones' petition for a writ of certiorari was filed on May 5, 1967. On April 21, 1967, Mr. Justice Harlan extended petitioner Mittelman's time within which to file a petition for a writ of certiorari to and including June 6, 1967, and his petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the administration of the oaths which petitioners took in executing their affidavits, later filed by petitioner Mittelman in support of a motion for a new trial in a federal criminal case to which he was a party, were authorized by a "law of the United States" within the meaning of that term as used in the federal perjury statute.

2. Whether petitioners, each of whom was charged in a separate count with making a perjurious affidavit, which one of the two later filed in support of a motion for a new trial in a criminal case involving him, were properly joined as defendants in a single indictment.

3. Whether petitioner Jones was entitled to a severance because a portion of the evidence, the grand jury testimony of petitioner Mittelman, was admissible only as against Mittelman.

4. Whether the instruction to the jury that it could consider the allegedly perjurious affidavit of each petitioner against the other if it found that the affidavits had been executed pursuant to a joint undertaking to secure a new trial for petitioner Mittelman was correct.

5. Whether the trial court erred in admitting, without objection, the grand jury testimony of petitioner Jones, given pursuant to subpoena after he had been advised of his right not to incriminate himself.

6. Whether petitioner Jones' conviction is supported by the evidence.

7. Whether petitioner Jones' right to a speedy trial was violated, it appearing that he at no time demanded to be tried during the three-year period between the return of the indictment and the calling of the case for trial, and that, when the case was called, his attorney expressly declined to move to dismiss the indictment by reason of the delay now complained of.

8. Whether the statement in petitioner Mittelman's affidavit, which the indictment charged to be perjurious, was material to the motion in support of which it was offered.

9. Whether petitioner Mittelman's trial was unfair because the indictment referred to his conviction out of which the perjury charges arose.

STATUTES AND RULES INVOLVED

The federal perjury statute, 18 U.S.C. 1621, provides in pertinent part:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, * * * willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, ex-

cept as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. * * *

The Act of July 3, 1926, 44 Stat. 830, 5 U.S.C. 92a, provides in pertinent part:

> In all cases in which, under the laws of the United States, oaths are authorized or required to be administered, they may be administered by notaries public duly appointed in any State, District, or Territory of the United States * * *

The Federal Rules of Criminal Procedure provide in pertinent part:

RULE 8. JOINDER OF OFFENSES AND OF DEFENDANTS

* * * * *

(b) *Joinder of Defendants.*

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

RULE 33. NEW TRIAL

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment * * * * * *

Rule 47. Motions

> An application to the court for an order shall be by motion. * * * It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of perjury, in violation of 18 U.S.C. 1621 (*supra*), for submitting false affidavits in support of a motion by petitioner Mittelman for a new trial in a criminal case involving him and others (1 R. 2a–6a; Tr. 1–590). On October 3, 1966, each petitioner was sentenced to 18 months' imprisonment, the judgment specifying that he was to be eligible for parole, pursuant to 18 U.S.C. 4208(a)(2), at such time as the Board of Parole should deem appropriate (1 R. 7a; Tr. 842, 843). The court of appeals affirmed (J. Pet. App. A).

The pertinent facts are as follows:

In 1960, petitioner Mittelman and others were convicted in the district court of mail fraud and conspiracy to sell unregistered securities. Mittelman's conviction was affirmed on August 22, 1961. *United States* v. *Crosby et al.*, 294 F. 2d 928 (C.A. 2), certiorari denied *sub nom. Mittelman* v. *United States*, 368 U.S. 984. Petitioner Jones, whom the indictment in the earlier proceeding had named as a co-conspirator, had been in New York under government subpoena during part of that trial but had not been called as a

witness either by the government or by any defendant (Tr. 669–670, 702–703).

On May 15, 1962, petitioner Mittelman filed in the district court a motion for a new trial on the ground of alleged newly discovered evidence and alleged suppression by the government of evidence favorable to him (Tr. 633–634).[2] In support of that motion Mittelman filed two affidavits (3 R. 46a–47a, 50a–51a)—one by petitioner Jones, sworn to April 2, 1962 (Tr. 702–707; M. Pet. App. 18a–23a), and one by Mittelman, executed May 15, 1962 (Tr. 635–675; M. Pet. App. 1a–17a). The present prosecution is based on allegedly perjurious statements contained in the two affidavits.

Jones attested in his affidavit that two of the government witnesses at the mail fraud trial, Robert Holland and Howard Carroll, had given false testimony against Mittelman (Tr. 702–706; M. Pet. App. 18a–22a). Mittelman stated in his affidavit that he had always known that if Jones told the truth Jones could prove that Holland and Carroll had lied (Tr. 670; M. Pet. 15). In the assertedly perjurious portion of his affidavit, Mittelman sought to excuse his failure to elicit such proof, through Jones, at his trial. He swore in relevant part (1 R. 6a; Tr. 670; M. Pet. 15):

> * * * Before I could make up my mind whether to issue a subpoena [for Jones], or depend on his being called by the prosecutor,

[2] The motion invoked both Rule 33 of the Federal Rules of Criminal Procedure (p. 4, *supra*) and 28 U.S.C. 2255.

> he was suddenly excused just before the defense was to begin, and he was not to be located.

Jones, in the allegedly false passage of his affidavit, corroborated Mittelman as to Jones' unavailability to Mittelman as a witness during the period in the mail fraud trial when the defense was presenting its evidence. He attested in relevant part (1 R. 4a–5a; Tr. 702–703; M. Pet. App. 19a):

> 4. * * * I was in New York for many weeks during the trial waiting to testify. At the last moment and just before the government rested its case, I was advised that I would not be used by the government as a witness and it was suggested that I leave town.
>
> 5. The government told me about 5:00 o'clock in the evening that it was not going to use me. That same evening my wife and I packed and we left New York City in my automobile, and we started travelling [to Texas by way of Maryland, Washington, D.C., and North Carolina]. * * * This travelling * * * took some three weeks. During this period it would have been impossible for any one other than those whom I telephoned to locate me and needless to say, I did not telephone Mr. Mittelman or any of the other defendants in the instant case.

The perjury indictment (1 R. 2a–6a) was in two counts—the first involving Jones' affidavit and the second, Mittelman's. It was charged that the quoted portions of the affidavits were false in that Jones and Mittelman had met and conferred on May 4, 1960,

after the government had rested its case in the mail fraud trial, and that Jones had thereafter remained in New York City at least until May 6, 1960, at which time the defense was presenting its evidence (1 R. 5a, 6a).

The evidence adduced by the government in support of these allegations may be summarized as follows:

The government rested its case in chief in the mail fraud trial on May 2, 1960; defense motions were made and argued on May 3; there were no proceedings on May 4; and the defense began putting in its evidence on May 5 (3 R. 23a–24a, 52a–53a). On the evening of May 4, Mittelman, Jones, Mittelman's attorney in the mail fraud trial (a Mr. Garlock), Harris Steinberg (the attorney for a co-defendant of Mittelman's), and a number of other attorneys and defendants involved met and conferred in a suite of the Royalton Hotel in New York City, which Mittelman had engaged for the purpose (3 R. 24a–30a, 32a–33a, 41a–45a). Mittelman's purpose in arranging the meeting was to give the defense attorneys in attendance an opportunity to meet Jones, to hear his proposed testimony, and to decide, "in a cooperative spirit," whether it would be wise to call him (3 R. 42a–45a). Mittelman had told Steinberg prior to the meeting that he thought Jones should be called, but that he desired to get the attorneys' views on the matter (3 R. 42a, 45a). After seeing and listening to Jones, Steinberg told Mittelman that in his view Jones should not be called (3 R. 43a).

A check payable to "Cash" in the amount of $300, drawn by Mittelman on his account in a New York

City bank on May 6, 1960, and bearing on its face the handwritten words "Jones-Expense," was cashed by the bank on that date (2 R. 58; 3 R. 18a–20a; G. Ex. 8, Tr. 74; Tr. 76).

The affidavit of Jones containing the allegedly perjurious statements was entitled "Affidavit of Paul R. Jones in support of Leo B. Mittelman's motion for a new trial under Rule 33." One of its introductory paragraphs read: "I am making this affidavit at the request of Leo B. Mittelman and I have been advised that he intends to use it in connection with a motion for a new trial" (3 R. 51a, 99a; Tr. 702; M. Pet. App. 18a). Jones read the affidavit, which had been drawn up in the office of Mittelman's attorney, before signing and swearing to it. The oath was administered to Jones by the attorney's secretary, a notary public licensed by the State of New York (3 R. 47a–51a).

Both petitioners testified before the grand jury which later indicted them (2 R. 10–28, 30–52). Mittelman appeared at his own request (2 R. 10). Jones, who appeared pursuant to subpoena, consulted Mittelman's attorney the day prior to his appearance (2 R. 30–31). Both petitioners were advised at the outset of their testimony of their privilege not to incriminate themselves (2 R. 10, 30). The testimony of each was received in evidence at the trial—limited, in each instance to the defendant whose testimony it was (3 R. 115a; Tr. 279, 327, 337, 359).

Jones testified before the grand jury that he discussed the contents of his affidavit with Mittelman and Mittelman's attorney in the latter's office on the day before he executed it. Mittelman and the attorney

had asked him to subscribe to an affidavit stating that government witnesses Holland and Carroll had lied at the mail fraud trial and that it would have been impossible for the defense to locate Jones after he left New York for the last time, while the trial was still in progress (2 R. 38). There had been, Jones testified, no discussion about putting into the affidavit the matter of the meeting with defense counsel at the Royalton Hotel or of the fact that Jones had been in New York while the defense case was in progress (2 R. 38–39). Jones further testified that he pointed out to Mittelman and the attorney that the defense at the mail fraud trial could have called him as a witness if it had wished to but that it had decided not to (2 R. 40–41).

Mittelman testified before the grand jury that he personally prepared the first draft of Jones' affidavit and that he and his attorney reviewed it with Jones before the final version was prepared (2 R. 26–27). Jones, on hearing the draft which Mittelman had composed, insisted, according to Mittelman, that the attorney change the text of paragraphs 4 and 5 to the phraseology which appeared in the affidavit as finally submitted (p. 7, *supra*) (2 R. 18–19). Because Mittelman had recalled the meeting at the Royalton Hotel, he testified, he had expressed doubt to Jones and the attorney as to whether the paragraphs as finally drafted were right in their "chronology." But when Jones insisted that his recollection of the chronology was correct, Mittelman said, he made no further objection (2 R. 16–19). Mittelman acknowledged that he wrote the May 6 check for $300 (pp. 8–9, *supra*) and

that its purpose was to reimburse Jones for the latter's expenses in coming to New York to attend the May 4 meeting at Royalton Hotel (2 R. 13, 23–24).

ARGUMENT

1. Petitioners contend that they did not violate the federal perjury statute (p. 3, *supra*) because no "law of the United States" authorized the administration of the oaths which they took (J. Pet. 10–14). The contention, which was raised for the first time in petitioner Jones' supplemental petition for rehearing in the court of appeals (3 R. 203a–207a) and which petitioner Mittelman (who has never previously urged it) adopts by reference (M. Pet. 3, 25), is without merit. Petitioners' affidavits were filed in the district court by Mittelman in support of his motion for a new trial. Jones was aware, when he executed his affidavit, that Mittelman planned to use it for this purpose. P. 9, *supra*. The motion was filed pursuant to Rule 33 of the Federal Rules of Criminal Procedure (p. 4, *supra*), authorizing the granting of a motion for a new trial on the ground of newly discovered evidence. The affidavits were filed pursuant to Rule 47 (p. 5, *supra*), authorizing the supporting of any motion "by affidavit." These Rules are laws of the United States within the meaning of the perjury statute. *United States* v. *Hvass*, 355 U.S. 570. As the Court there observed, a "law of the United States," as that term is used in the perjury statute, "is not limited to statutes, but includes as well Rules and Regulations which have been lawfully authorized and have a clear legislative base." 355 U.S. at 575. The Federal Rules of Criminal

Procedure have far more than a "clear legislative base." Adopted by this Court pursuant to express statutory authority, 18 U.S.C. 3771 and 3772, they have the force and effect of law.

It is immaterial that Jones' oath was administered by a State notary public.[8] Federal law expressly provides that in all cases in which, under the laws of the United States, oaths are authorized to be administered, they may be administered by notaries public duly appointed in any State. Act of July 3, 1926, 44 Stat. 830, 5 U.S.C. 93a (p. 4, *supra*).

2. There is no merit to petitioners' contention (J. Pet. 17–18; M. Pet. 42–43) that the indictment misjoined them as defendants. Rule 8(b) of the Federal Rules of Criminal Procedure (p. 4, *supra*) authorizes joinder of defendants in the same indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." The indictment at bar fully complied with this Rule.

The perjuries involved were manifestly intimately related. Each involved the same basic misrepresentation of fact and each had the same objective—the obtaining of a new trial for petitioner Mittelman. It appeared from the face of Jones' affidavit that it had been given to support Mittelman's motion and both petitioners acknowledged before the grand jury that they had collaborated closely in its preparation (pp.

[8] Mittelman's oath was administered by a federal parole officer (3 R. 46a–47a; Tr. 223–224, 675). Such officers have explicit federal statutory authority to administer oaths. 18 U.S.C. 4004.

9–10, *supra*). That Mittelman's affidavit was executed after that of Jones and in Jones' absence is immaterial. In view of the substantial identity of the allegedly perjurious representations, the collaboration by petitioners in Jones' affidavit, and the common objective of each, the perjuries charged, within the fair intendment of Rule 8(b), were part of the "same series of acts or transactions constituting an offense or offenses." Cf. *Application of Gottesman*, 332 F. 2d 975 (C.A. 2); *United States* v. *Hoffa*, 349 F. 2d 20, 42–43 (C.A. 6), affirmed on other issues, 385 U.S. 293; *Wiley* v. *United States*, 277 F. 2d 820, 824 (C.A. 4), certiorari denied, 364 U.S. 817; *Kivette* v. *United States*, 230 F. 2d 749, 753 (C.A. 5), certiorari denied, 355 U.S. 935; *Scheve* v. *United States*, 184 F. 2d 695 (C.A.D.C.).

Rule 8(b) is explicit that the defendants "may be charged in one or more counts together or separately and all of the defendants need not be charged in each count." Thus the fact that each count charged one of the petitioners alone is immaterial.[4]

3. Petitioner Jones contends that, if it be assumed that his joinder with Mittelman was authorized by Rule 8(b) in the first instance, his joint trial with

[4] Petitioner Jones' reliance on *McElroy* v. *United States*, 164 U.S. 76 (J. Pet. 18) is misplaced. The offenses there involved were "in nowise parts of the same transaction" (164 U.S. at 81). *Metheany* v. *United States*, 365 F. 2d 90, 94, n. 4 (C.A. 9), which Jones also cites (J. Pet. 18), merely cites the general rule that each count of the indictment, for joinder to be proper, must have arisen out of the same series of transactions in which all of the defendants participated. For the reasons we have stated, there was no departure from this rule in this case.

Mittelman was nevertheless prejudicial in the particular circumstances of this case—with the consequence, he urges, that his motion for severance under Rule 14 (J. Pet. App. B 15a), made prior to and renewed during the trial (Tr. 773–774; 2 R. 8–9, 29), was erroneously denied (J. Pet. 24–27).[5] The prejudice stemmed, it is said, from the fact that Mittelman's grand jury testimony—which was admissible only as against Mittelman—contained statements incriminatory of Jones which the jury (it is argued) must have used against Jones as well (J. Pet. 25–27). The contention is without merit.

The granting or denial of a severance rests in the sound discretion of the trial court. *Schaffer* v. *United States,* 362 U.S. 511, 514–516; *Delli Paoli* v. *United States,* 352 U.S. 232, 243; *Opper* v. *United States,* 348 U.S. 84, 95. There was no abuse here. Even where the evidence which assertedly requires severance is a confession, implicating by name a defendant against whom it is not admissible, there is no absolute requirement of separate trials. *Delli Paoli* v. *United States, supra,* 352 U.S. at 236–243; cf. *Opper* v. *United States, supra,* 348 U.S. at 94–95. Here the grand jury testimony of each petitioner was basically exculpatory in its tenor and intent (although each contained admissions which, viewed with the other evidence in the case, the jury found sufficient to warrant conviction). The trial court carefully and repeatedly instructed the jury to consider the testimony of each only as

[5] Petitioner Mittelman seeks to adopt this contention (M. Pet. 42–44). It is, however, not available to him, as he at no time moved for a severance.

against the indivdual who gave it (3 R. 115a; Tr. 279, 327, 337, 359). Here, as in *Delli Paoli*, there was no "mass trial" or "multiplicity of evidentiary restrictions" (352 U.S. at 241). Only petitioners were on trial, the issues were simple, and there is no reason to suppose that the jury had difficulty in following the court's instructions.

Jones' contention that the jury must have used Mittelman's testimony against him because without it the jury had no basis for concluding that the allegedly perjurious statements in Jones' affidavit had been made with criminal intent (J. Pet. 26–27) is unsound. Jones' intent could have been inferred from—*inter alia*—his own acknowledgement to the grand jury that he pointed out to Mittelman and Mittelman's lawyer, in the course of the preparation of his affidavit, that Mittelman could have called him as a witness at the mail fraud trial if he had wished to but that he had decided not to (2 R. 40–41). It was, of course, precisely the omission of this critical information from both affidavits which resulted in their being materially false and misleading.

4. Petitioner Jones contends (J. Pet. 19–22) that the decision of the court of appeals "permits a wider scope of admissibility of evidence in prosecutions of defendants charged separately and independently in one indictment than if they were charged with conspiracy, joint action, or aiding and abetting" and thus "presents dangers even greater than those in conspiracy prosecutions" (J. Pet. 19).[6] He relies (see

[6] Petitioner Mittelman adopts the contention by reference (M. Pet. 3, 25, 43).

ibid.) on the fact that the trial court instructed the jury (3 R. 115a–116a) that it could consider the affidavit of each petitioner against the other if it found that the affidavits had been executed pursuant to a "common agreement or undertaking to secure a new trial" for Mittelman. He argues that under this instruction there need be "only an agreement to commit a legal act by legal means" to make a defendant's declarations admissible against a codefendant (J. Pet. 20) and that the court of appeals "approv[ed]" the instruction (J. Pet. 21).

In the first place, the instruction referred to was not "approved" by the court of appeals. The court of appeals had no occasion to consider the instruction because neither it nor any other was challenged in that court.[7]

Secondly, the challenge here made to the instruction is foreclosed by Rule 30 of the Federal Rules of Criminal Procedure. For, while Jones objected to the instruction at the trial, he did so on a ground altogether different from that now urged. The criticism of the instruction which he now makes is that it permitted the jury to consider each petitioner's affidavit against the other if it found a "mere legal" agreement

[7] The statement in the court of appeals' opinion to which Jones refers as approving the instruction (J. Pet. 19)—that "[t]here need be no charge of conspiracy to make actions and declarations of joint actors in furtherance of a common illegal plan admissible against each other" (J. Pet. App. A 7a)—was made in explanation of the court's holding that the joint trial of petitioners had not been prejudicial. The statement had no relation to the instruction now challenged or to any other.

on the part of the petitioners to seek a new trial for Mittelman (J. Pet. 19, 20, 21). At the trial he challenged the instruction only on the ground that the indictment *did not allege* any agreement or joint undertaking (2 R. 56–57). Rule 30 is explicit that no portion of the instructions may be assigned as error unless objection thereto (including "the grounds" thereof) is distinctly articulated before the jury retires to deliberate.

In all events, the instruction was correct in substance. It is well settled that statements made by each conspirator during the existence of the conspiracy, and in furtherance of its ends, are admissible against all (*e.g., Delli Paoli* v. *United States,* 352 U.S. 232, 237; *Lutwak* v. *United States,* 344 U.S. 604, 617; *Fiswick* v. *United States,* 329 U.S. 211, 217) and that there need be no charge of conspiracy for this principle to be applicable—it being enough that the evidence discloses one. *St. Clair* v. *United States,* 154 U.S. 134, 149; *United States* v. *Annunziato,* 293 F. 2d 373, 378 (C.A. 2), certiorari denied, 368 U.S. 919; *United States* v. *Pugliese,* 153 F. 2d 497, 500 (C.A. 2).[8] It is

[8] Where the conspirator whose statement is in issue is a codefendant who chooses not to take the witness stand, the defendant against whom the statement is received is of course unable to cross-examine its maker (see J. Pet. 22–23). This, however, is a commonplace of joint trials in which the evidence shows conspiracy (whether or not conspiracy is alleged) and has never been thought to present a problem under the confrontation requirement of the Sixth Amendment. The situation would not be different if separate trials were granted; the maker of the statement, if subpoenaed to testify by the defendant against whom the statement was offered, could decline to testify (invoking his privilege against self-incrimination) as readily as he

clear from the context in which the challenged instruction was given that the court, in referring to a "common agreement or undertaking to secure a new trial" for Mittelman, was referring to an improper agreement to achieve that end—through deception of the court. See, particularly, 3 R. 98a–102a. The instruction, indeed, was more favorable to petitioners than they had a right to demand. See *United States* v. *Dennis,* 183 F. 2d 201, 231 (C.A. 2), affirmed on other issues, 341 U.S. 494: "[T]he better doctrine is that the judge is always to decide, as concededly he generally must, any issues of fact on which the competence of evidence depends, and that, if he decides it to be competent, he is to leave it to the jury to use like any other evidence, without instructing them to consider it as proof only after they too have decided a preliminary issue which alone makes it competent." Accord, *Carbo* v. *United States,* 314 F. 2d 718, 735–738 (C.A. 9), certiorari denied, 377 U.S. 953.

5. Petitioner Jones contends that it was error for the trial court to admit his grand jury testimony in evidence against him because he appeared before the grand jury pursuant to subpoena and was a potential defendant. His testimony was thus obtained through

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can elect not to take the witness stand when on trial himself. *Pointer* v. *Texas,* 380 U.S. 400, relied on by petitioner Jones (J. Pet. 22), is not in point. The Court there condemned, as violative of the confrontation clause, a State's attempt to use at a robbery trial a transcript of the complaining witness' testimony at a preliminary hearing, at which the accused, unrepresented by counsel, had failed to exercise his right of cross-examination. The Court carefully limited its holding to situations of the type before it (380 U.S. at 407).

"a form of compulsion," he says, and for that reason ought not have been received at the trial (J. Pet. 14–15).[9]

We note, in the first place, that this issue was not raised at the trial or, indeed, at any stage of the proceedings in the district court. The point was first urged, as Jones acknowledges (J. Pet. 15), in his supplemental petition for rehearing in the court of appeals (3 R. 211a–213a). Not having been seasonably presented, it need not now be considered. Cf. *United States* v. *Bell,* 351 F. 2d 868, 874 (C.A. 6), certiorari denied, 383 U.S. 947. Moreover, the contention is clearly untenable.

The constitutional prohibition against compulsory self-incrimination does not preclude a grand jury from subpoenaing one who may appear to it, from other evidence before it, to have committed an offense germane to the jury's inquiry. Subject to the right of the witness to assert his privilege in response to specific questions, a grand jury is not prohibited from making pertinent inquiries of one who, being himself a subject of the investigation, is a potential defendant. *Kitchell* v. *United States,* 354 F. 2d 715, 720 (C.A. 1), certiorari denied, 384 U.S. 1011; *United States* v. *Bell,* 351 F. 2d 868, 874 (C.A. 6), certiorari denied, 383 U.S. 947; *United States* v. *Winter,* 348 F. 2d 204, 206–208 (C.A. 2), certiorari denied, 382 U.S. 955; *United States* v. *Annunziato,* 293 F. 2d 373, 376 (C.A.

[9] Although petitioner Mittelman seeks to adopt by reference all of petitioner Jones' contentions (M. Pet. 3, 25), it is clear that this contention is not available to Mittelman, who appeared before the grand jury at his own request (2 R. 10).

2), certiorari denied, 368 U.S. 919; *United States* v. *Cleary*, 265 F. 2d 459 (C.A. 2), certiorari denied, 360 U.S. 936; *United States* v. *Klein*, 247 F. 2d 908, 920–921 (C.A. 2), certiorari denied, 355 U.S. 924; *United States* v. *Scully*, 225 F. 2d 113 (C.A. 2), certiorari denied, 350 U.S. 897. The grand jury would be "denude[d] * * * of a substantial right of inquiry" if it were prevented from summoning one whom others have accused of crime to inquire what he has to say about the matter before deciding whether to return a true bill. *United States* v. *Winter, supra*, 348 F. 2d at 207–208. Jones was fully advised at the commencement of his grand jury testimony of his right not to incriminate himself (2 R. 30). As he acknowledged at the time, moreover, he had consulted with an attorney (Mittelman's) on the afternoon preceding his appearance (2 R. 30–31). His rights were thus fully protected.[10]

6. Contrary to petitioner Jones' contention (J. Pet. 27–29), his conviction was amply supported by the evidence. The government established that Jones and Mittelman attended a conference at the Royalton on the night of May 4, 1960, two days after the prosecution had rested its case in the mail fraud trial and just prior to the commencement of the defense's case on May 5. A purpose of the meeting was to decide whether Mittelman should call Jones as a defense

[10] *Garrity* v. *New Jersey*, 385 U.S. 493, cited at J. Pet. 14, is inapposite. That case involved potentially incriminatory interrogatories which police officers, in a State inquiry into ticket-fixing, were required to answer under pain of forfeiting their jobs. No such "form of compulsion" (385 U.S. at 497) is involved here.

witness and the decision was made that he would not. Jones' statement in his affidavit that he left New York on a three-week trip "just before the government rested its case" was therefore false.[11] Its plain purpose was to give support and corroboration to Mittelman's false claim that Jones' testimony, which he was tendering in support of his motion for a new trial, had been unavailable to him during the critical period of the trial (when the defense was putting in its evidence)—and hence that this indispensable prerequisite to the granting of a new trial on the ground of newly discovered evidence was present in this case. Jones admitted to the grand jury, moreover, that he had collaborated with Mittelman in the preparation of his (Jones') affidavit and that he had pointed out to Mittelman at that time that Mittelman could have called him as a witness if he had wished to but that he had decided not to. The petit jury thus had more than am-

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[11] As Jones notes (J. Pet. 27), the government rested twice in the mail fraud prosecution—once on May 2 (following the presentation of its case in chief) and again on May 12 (following completion of the defense's case) (2 R. 54; 3 R. 52a–53a). It is manifest from the context, however, that Jones, in the allegedly false passage of his affidavit, intended to refer to the government's resting in chief. Otherwise the critical paragraphs of his affidavit (4 and 5, see p. 7, *supra*) would have been pointless. (Their evident point was that, because of Jones' inaccessibility to Mittelman during Jones' three-week trip, Mittelman could not have located Jones in time to call him as a witness during the period in the trial in which the defense was putting in its evidence.) There is, thus, no substance to Jones' argument that the indictment was fatally ambiguous as to him for failing to allege "which resting the affidavit referred to" (J. Pet. 27). At all events, the alleged ambiguity in the indictment is raised for the first time in this Court. Since Jones at no time sought dismissal of the indictment on this ground, he is foreclosed from raising the issue now.

ple grounds for concluding that Jones' untrue statement had been willfully made.

7. There is no substance to petitioner Jones' contention that his right to a speedy trial was violated (J. Pet. 16). At no time prior to trial, which occurred three and a half years after the return of the indictment did Jones raise any objection to the delay.[12] On the contrary, when the case was called, Jones, through his attorney, expressly declined to move to dismiss on this ground (Tr. 777, 823, 824–825). The instant contention, as Jones acknowledges, was first made in his supplemental petition for rehearing in the court of appeals (3 R. 202a–203a). The right to a speedy trial is a personal one which is deemed waived by failure to assert it. *United States* v. *Sanchez*, 361 F. 2d 824, 825 (C.A. 2; *Mack* v. *United States*, 326 F. 2d 481, 486–487 (C.A. 8), certiorari denied, 377 U.S. 947; *United States* v. *Lustman*, 258 F. 2d 475, 478 (C.A. 2), certiorari denied, 358 U.S. 880; *Campodonico* v. *United States*, 222 F. 2d 310, 316 (C.A. 9), certiorari denied, 350 U.S. 831; *Pietch* v. *United States*, 110 F. 2d 817, 819 (C.A. 10), certiorari denied, 310 U.S. 648. Even if it be true, therefore, as Jones alleged in his affidavit in support of his supplemental petition (3 R. 216a–219a), that unidentified "Internal Revenue authorities," some time between his indictment and trial, mistakenly advised him that the case against him had been dismissed (3 R. 218a), the fact would be immaterial. It would still have been incumbent on him, upon learning that his informants had been in error,

[12] The record does not indicate the reason for the delay—other than that Mittelman was incarcerated under his mail fraud sentence during the interval.

to seek dismissal for laches if he desired to rely on this ground. *Klopfer* v. *North Carolina*, 386 U.S. 213, cited by Jones, is inapposite. The North Carolina procedural device ("*nolle prosequi* with leave") which the Court there held violative of the accused's right to a speedy trial had been employed by the State over the defendant's vigorous and persistent opposition (386 U.S. at 217–218).[13]

8. Petitioner Mittelman contends that the perjurious statement in his affidavit (pp. 6–7, *supra*) was not material to the motion in support of which it was offered (M. Pet. 25–33, 45–47). The argument has two facets, neither meritorious.

a. It makes no difference, as the court of appeals observed (J. Pet. App. A 9a), whether the "main thrust" of the motion for a new trial was simply that Jones, the witness whom Mittelman was tendering to the district court as the source of the newly discovered evidence, would establish that government witnesses Carroll and Holland had lied at the mail fraud trial or that Jones would prove in addition (by attesting that he had so advised the prosecutor during the mail fraud trial) that the government had know-

[13] Unlike Jones, petitioner Mittelman (who adopts all of Jones' contentions, see M. Pet. 3, 25) did move, when the perjury case was called for trial, to dismiss the indictment because of the substantial time lapse since the return of the indictment (Tr. 747–771). However, since Mittelman, like Jones, had made no effort to compel an early trial during the three-year period when the case lay dormant, he must be presumed, like Jones, to have acquiesced in the delay. See authorities cited in the text, *supra*. At all events, Mittelman failed to pursue this issue in the court of appeals. For both these reasons the issue is as unavailable to him at this time as it is to Jones.

ingly used their allegedly tainted testimony (M. Pet. 25–33). The plain purport of the statement of Mittelman's charged by the government to have been false was that Jones had been unavailable to him during the critical period of the mail fraud trial—when the defense was presenting its evidence ("* * * he was suddenly excused just before the defense was to begin, and he was not to be located"). This representation was needed to comply with the requirement that newly discovered evidence, to afford grounds for a new trial, must appear not to have been seasonably discoverable through the exercise of reasonable diligence (*e.g.*, *United States* v. *Abrams*, 357 F. 2d 539, 550 (C.A. 2), certiorari denied, 384 U.S. 1001). The statement was therefore plainly material; for whatever may have been the full tenor of the proffered testimony, it was vital to the success of the motion to show that Mittelman had not been dilatory in discovering the new evidence he was relying on.

b. In a passage of his affidavit occurring after the statement charged to have been perjurious, Mittelman acknowledged that (M. Pet. 16)

> * * * from a strict and narrow point of view it might be argued that I had an opportunity to call Jones as my witness * * *.

He argues that the representation charged to have been false was not material in consequence of this "concession" (M. Pet. 45–47). In the first place, however, there was no outright "concession" of the sort which the present contention implies. All that Mittelman conceded was that "it might be argued that" he had had an opportunity to call Jones as his witness—and even

this "argu[ment]," he implied, ought to fail because it proceeded from a "strict and narrow point of view." More important, the quoted "concession" was at most an acknowledgement that Mittelman had had the opportunity, *during the government's presentation of its case*, to place Jones under subpoena—for use when the defense's presentation would get under way. The statement found by the jury to be perjurious, on the other hand, related precisely to that subsequent period.

9. There is no merit to petitioner Mittelman's contention (M. Pet. 37–41) that his trial was unfair because the indictment referred to his mail fraud conviction, out of which the perjury charges arose. The fact is that the portions of the indictment in which the mail fraud conviction was referred to (1 R. 2a–3a) were withheld from the jury pursuant to a *sua sponte* ruling of the trial judge (Tr. 13–14, 20–21, 35–42, 853–861). As the opinion below points out, moreover, the judge went to "extraordinary lengths" in an effort to keep knowledge of the mail fraud conviction from the jury (J. Pet. App. A 8a). The jury was informed that the perjury charges arose out of a prior judicial proceeding to which Mittelman was a party. But it was never apprised of the criminal nature of this prior proceeding (see, *e.g.*, Tr. 41, 245–246, 247, 250–251, 253–255, 257–259, 261–262, 853–855). The only substantial indication which the jury had that the earlier proceeding had been a criminal trial was the fact that Mittelman himself, in the portion of his affidavit which was charged to be perjurious (and which thus, unavoidably, came to the jury's at-

tention), had used the words "prosecutor" and "prosecutors" (1 R. 6a; see Tr. 45, 46–47, 505–506, 859–860).

As the court of appeals noted (J. Pet. App. A 8a–9a), the trial judge's rulings in this connection were more favorable to Mittelman than the rules of evidence required. For the fact of Mittelman's mail fraud conviction was plainly germane to the perjury trial—to show the strong motive Mittelman had for making a false affidavit (and collaborating with Jones in the latter's). It is well settled that evidence that is otherwise relevant is not inadmissible merely because it shows that the accused committed a crime other than that for which he is on trial. Evidence of another crime is barred only if introduced solely for the purpose of showing that the defendant is a person of criminal character. See, *e.g.*, *United States* v. *Bozza*, 365 F. 2d 206, 213 (C.A. 2), and the authorities therein cited.[14]

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[14] There is plainly no substance to Mittelman's only remaining contention (M. Pet. 34–37) (which he makes for the first time in this Court)—that the representation in his affidavit which the jury found to be perjurious did not constitute perjury because it merely "summarize[d] and characterize[d]" Jones' affidavit (which, he says, since it was "attached to the motion papers," was "independently evalua[ble]") (M. Pet. 34). While the paragraph in Mittelman's affidavit which contained the allegedly perjurious matter was captioned "*The Jones affidavit*" (1 R. 5a–6a), it is not true that Mittelman's affidavit did no more than summarize and characterize Jones'. The representations which it contained were and purported to be his own.

CONCLUSION

For the reasons stated the petitions for writs of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 135

PAUL R. JONES,

Petitioner,

v.

UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER JONES

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UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER JONES

Though the new rules of this Court effective October 2, 1967 are not technically applicable to this Reply Brief, in the spirit of Rule 24(4) we address this Brief to arguments first raised in the Brief for the United States in Opposition.

1. The Government argues that petitioner Jones' conviction was amply supported by the evidence, because "Jones' statement in his affidavit that he left New York on a three-week trip 'just before the Government rested its case' was therefore false" (G. Br. 20-21).[1] But we have not here denied that Jones did meet with Mittelman on May 4, 1960, after the prosecution rested its case the first time. Jones' statement was thus inaccurate—but since the only evidence as to his belief (except Mittelman's grand jury testimony) was that he believed that the May 4

[1] Such references are to the pages in the Brief for the United States in Opposition.

meeting occurred while the Government was still presenting its case, being here at Government expense (see Jones' Petition, pp. 6, 29), his affidavit was not wilfully false. Nor did any of the many other participants in the May 4 meeting testify that Jones knew that the Government had rested prior thereto.

The Government twice contends that the plain purpose of Jones' statement "was to give * * * corroboration to Mittelman's false claim" (G. Br. 7, 21)—but the Government does not tell us how Jones could have corroborated Mittelman's false claim, since Mittelman's false claim was made six weeks after the execution of Jones' affidavit. Nor was there any evidence to show that Jones had any knowledge of the claim that Mittelman would make.

The Government attempts to circumvent this void by arguing that, from the context of the Jones affidavit, he intended to refer to the Government's resting in chief, that otherwise the critical paragraphs of his affidavit would have been "pointless" (G. Br. 21, n. 11).[2] However, this attributes to Jones, a layman, a knowledge of the "point" of his affidavit, which would only have been understood by a lawyer—a point which the Government here feels it must recite to this Court and support by citation (G. Br. 24). In any event, there was nothing to show that Jones knew the point of his affidavit. *Per contra*, the evidence showed he did not.

He was merely asked by Mittelman's attorney to give a certain affidavit. He told that attorney that Mittelman could have called him as a witness—but he was told by the attorney that the purpose of his (Jones') affidavit was merely to show that when he left New York he could not

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[2] The Government recites that "the alleged ambiguity in the indictment [as to which resting the Jones affidavit referred to] is raised for the first time in this Court." G. Br. p. 21, n. 11. Not so, the point was squarely raised in the Supplemental Petition for Rehearing below (Tr. 209a-210a).

have been called as a witness. Said Jones (2 R. 40-41):

> "Q. Did you read the affidavit before you signed it? A. Yes, sir.
>
> Q. And did you suggest to Mr. Rogge [Mittelman's attorney] at that time that, perhaps, you should put in the fact that this trip to Texas occurred after your last trip to New York, not after the time that the Government told you it was not going to use [you] as a witness? A. I don't remember saying it in that many words, but I do remember that I mentioned the fact, after this was prepared, that the defense could have called me as a witness if they wanted to but that they decided not to, and I don't remember the exact reply that I got, but this was—the purpose of this affidavit was to show that when I did leave that nobody could have gotten me back as a witness and that Holland and Carroll had perjured themselves on the witness stand.
>
> Q. Did you discuss with Mr. Rogge the fact that this affidavit was misleading and that it created the impression that you had left before the government had rested the case, and at that time was unavailable to the defense? A. No, I don't remember discussing that or going into that with Mr. Rogge. As I said a moment ago, I do remember our discussing the fact that they could have used me but that they didn't."

Although Mr. Rogge was present throughout the trial as counsel for Mittelman, the Government did not call him to the stand to demonstrate any untruthfulness in the above-quoted Jones' grand jury testimony.

Simply stated, there was simply no admissible evidence of Jones' guilt. He cannot be jailed for eighteen months in the absence of any admissible evidence whatsoever that he committed a crime without violation of due process. *Thompson* v. *Louisville*, 362 U. S. 199 (1960). Moreover, the proof in no regard whatsoever rises to the dignity of proof required by the perjury two-witness rule.

2. The Government contends that this Court decided, in *United States* v. *Hvass*, 355 U. S. 570, that the Federal Rules of Criminal Procedure are laws of the United States within the meaning of the perjury statute (G. Br. p. 11). However, *Hvass* did not involve the Federal Rules of Criminal Procedure, but involved an oath taken pursuant to a local court rule authorized by the Federal Rules of Civil Procedure. The Federal Rules of Criminal Procedure, on the other hand, were never intended to become law. This is manifest from the legislative history of Public Law 772 of the Eightieth Congress, which became Title 18 of the United States Code.

Thus, Charles J. Zinn, Esq., Counsel to the House Committee, which considered the 1948 revision of the Criminal Code (Title 18), said:

> "* * * There are a number of substantive matters relating to criminal procedure which are not properly the subject of court rules and these have not been incorporated in the proposed rules by the Supreme Court. * * * The reason for [the cross-referencing of the United States Code to the Rules] is that, although it is desirable to have the statutes and the rules in one place, inasmuch as Congress has restored to the Court its rule-making power, *there should be no suggestion by the incorporation of the text of the rules that Congress intends to enact the rules into law.* When the code is enacted into law the text of the rules will undoubtedly be carried as notes to the respective sections of title 18 of the United States Code referring to them and the convenience of the bench and bar will be thus best served." (Emphasis supplied) (92 Cong. Rec. A-60, A-62, reprinted in U.S.C.A., Title 18, last volume, pp. 675-676)

Mr. Zinn also testified at a hearing before the House Committee on Revision of the Laws, saying as follows:

"* * * The rules will in all likelihood be reported to Congress by the Attorney General at the opening of the next session and by the provisions of the authorizing act will become effective at the close of that session without any affirmative action being taken on the part of Congress. It is not a legislative job.

"On the other hand, the revision and codification of the criminal statutes contemplated by H.R. 5450 is purely and strictly a legislative one.

"These are two different and distinct works—the rules and the laws—and it is important to bear the distinction in mind." (18 U.S.C.A., last volume, p. 593.)

Later in his testimony, Mr. Zinn pointed out the distinction between the laws and the Rules of Criminal Procedure:

"* * * I ask you to consider the implications of that authorization [to promulgate rules of criminal procedure] and its effect upon laws relating to criminal procedure unless Congress takes action to conform the laws to the rules and specifically repeals obsolete laws." (*Id.* at 596.)

That Public Law 772, now known as Title 18 of the United States Code, is intended to embody in itself all the substantive law, and that the Rules of Criminal Procedure are not laws of the United States, is further shown by the remarks of Senator Wiley in a Senate floor discussion, where he said in part:

"The bill makes it easy to find the criminal statutes because of the arrangement, numbering, and classification. * * * The new Federal Rules of Criminal Procedure are keyed to the bill and are reflected in part II of title 18.

"Obsolete and executed provisions are eliminated. Uncertainty will be ended and there will no longer be any need to examine the many volumes of the Stat-

utes at Large as the bill, upon enactment, will itself embody the substantive law which will thus appear in full in the United States Code." (*Id.* at 671, 94 Cong. Rec. 8906.)

It is thus clear that whether the Federal Rules of Criminal Procedure are laws of the United States is a substantial question worthy of review here.

3. The Government argues (G. Br. 12-13) that there is no merit to our contention that the indictment misjoined Jones and Mittleman as defendants, since Rule 8(b) authorizes joinder of defendants in the same indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Though the Government specifically quotes the word "alleged", it ignores the fact that such an allegation was completely missing from the indictment. The indictment was a misjoinder.

4. The Government argues that the instruction was challenged in the Trial Court only because the indictment did not allege any agreement or joint undertaking. Not so. It was further challenged because this was not a conspiracy prosecution (Tr. 905). However, nothing in Rule 30 precludes our asserting here a different argument in support of a contention that the challenged evidence should have been excluded at the trial. Moreover, the plain error in the instructions and the resulting error in admitting Mittelman's affidavit and grand jury testimony against Jones would warrant reversal even if there had been a failure to object. *Lopez* v. *United States*, 373 U. S. 427, 436 (1963). But in any event, there was objection raised in both courts below as to the admissibility of Mittelman's affidavit and grand jury testimony.[3]

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[3] *E.g.*, the Brief of appellant Paul Jones in the Court of Appeals at page 18:

"The * * * inadmissibility of the Mittelman exhibits as against Jones, leaves the Government's case deficient as a matter of law."

5. The Government states twice (G. Br. 9, 20) that Jones had consulted with an attorney (Mittleman's) on the afternoon preceding his appearance. We had stated, however, that he had not consulted an attorney in regard to his appearance (J. Pet. 6). The Government's citations and ours to the Record are precisely the same. The accuracy of our statement is correct, as shown in the margin below.[4]

6. The Government contends that when the case was called, Jones, through his attorney, expressly declined to move to dismiss on the ground of delay of trial (G. Br. 22). Though the Government is accurate, we note that in pre-*Klopfer* days, such a motion would have been pointless. Accordingly, Jones was not precluded from raising the *Klopfer* point in the Court of Appeals for the first time. *Curtis Publishing Co.* v. *Butts,* 388 U. S. 372 (1967). He raised the point below within two weeks of this Court's decision in *Klopfer* v. *North Carolina,* 386 U. S. 213 (1967).[5]

There is another important factor relevant to grant of review: the deterrent effect of this conviction upon appli-

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[4] "Q. Have you consulted with an attorney with respect to your appearance here today? A. Not concerning my appearance here. Not a personal attorney, no.

Q. But you spoke to an attorney? A. Yes." (2 R. 30)

[5] The Government suggests that the reason for the delay in trial was Mittelman's incarceration in the interval (G. Br., p. 22). But this did not prevent an earlier trial. So noted Chief Judge Sugarman:

"The Court: Why wasn't it prosecuted sooner?

Mr. Baer [Asst. U. S. Atty.]: Because the defendant Mittelman was in jail.

The Court: Why couldn't you bring him down here on a writ?

Mr. Baer: Well, that is something his lawyers can tell you about.

The Court: No, you could have done it.

Mr. Baer: Well, your Honor—

The Court: We do it every day." (Tr. 738).

cation for a new trial. New trials based on newly discovered evidence are almost impossible to secure in a federal court; there are many roadblocks, most of which are archaic, which developed arbitrarily, without rationale. [The writer has written extensively on this in his article, Levy, "Justice—After Trial", 11 New York Law Forum 241, 369 (1965)]. Now that the entire might of the United States Government can descend upon a witness who signs a somewhat ambiguous affidavit in support of a motion for a new trial, prepared by an attorney not of his own choice, without any motive to lie, it is almost unthinkable that any person hereafter would be able, willing or wise to give an affidavit in support of a motion for a new criminal trial. It is altogether too easy to make mistakes. And since the decision below permits the convict to turn against the witness later, while shielding himself from cross-examination, the decision below may seriously interfere with the rights of convicts to apply for a new trial. The ambiguity should be corrected by a hearing—not by a conviction for perjury. Cf. *Surowitz* v. *Hilton Hotels Corp.*, 383 U. S. 363 (1966).

CONCLUSION

This Court should grant certiorari, the judgment below should be reversed, and the indictment dismissed.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1967

No. 135

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v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Paul R. Jones, hereby petitions for a rehearing of this Court's October 9, 1967 denial of a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, affirming his conviction for perjury in the swearing to an affidavit submitted for the purpose of obtaining a new trial for one Mittelman.

On October 9, 1967, this Court granted review in two cases on its Miscellaneous Docket, *United States ex rel. Garner* v. *Yeager* and *Bruton* v. *United States.** In both of these cases, the constitutional question to be reviewed

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* These cases are now respectively Nos. 704 and 705; on October 9, they were respectively Nos. 66 Misc. and 109 Misc.

was essentially whether a charge to the jury, that the confession of a co-defendant could be used solely against the declarant and not against petitioner, violates due process. (This type of charge previously had been approved by this Court in *Delli Paoli* v. *United States*, 352 U. S. 232.) In the case at bar, the first paragraph of the charge to the jury (reprinted as Appendix A hereto) was totally indistinguishable from the charges to be reviewed here in *Garner* and *Bruton*. It would therefore seem that review should be granted here.

Moreover, the charge here went further. The jury was then instructed that the grand jury testimony of petitioner Jones' co-defendant Mittelman, given voluntarily to a grand jury investigating possible perjury in earlier affidavits, for which the grand jury later indicted Jones, was admissible only as to Mittelman, that it was admissible "similarly" to Mittelman's earlier affidavit, and that Mittelman's earlier affidavit was admissible against Jones if Jones had previously furnished an affidavit as part of an agreement to obtain a new trial for Mittelman (Appendix A, *infra*). Thus, though the instructions in *Garner* and *Bruton* protected the petitioners there to extent that the jury could perform the mental gymnastics required by the exclusionary charge, the jury here was invited to consider the admissions of the co-defendant Mittelman against petitioner Jones.[1]

It may be argued that there had been joint action by Jones and Mittelman in submitting the earlier affidavits

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[1] The Government noted in its Brief here that Mittelman's grand jury testimony "contained admissions which, viewed with the other evidence in the case, the jury found sufficient to warrant conviction." (Brief for the United States in Opposition, p. 14.) The Court below mentioned the possibility of Mittelman's grand jury testimony having been considered by the jury, but thought such consideration would have been "in violation of the instructions." (See Jones' petition, pp. 10a-11a.) In any event, the instructions here did not begin to approach the clarity of the oft-repeated instructions in *Garner* and *Bruton*.

ruled perjurious, thus enabling the later admissions (made after complete termination of all joint action) of Mittelman to be used against Jones. But even then, the same question is presented as in *Garner* and *Bruton*, for in both those cases the defendants acted jointly in the commission of their crimes. (As to *Garner*, see *State* v. *Sullivan*, 43 N. J. 209, 216, 221, 236; as to *Bruton*, see his petition here, p. 2, noting Bruton was tried as an accomplice with his co-defendant.)

If *Garner* and *Bruton* deserve review, the case at bar deserves review *a fortiori*—for these reasons:

1. *Garner* is a collateral attack, on a state conviction. The case at bar is a direct non-collateral attack, upon a federal conviction.

2. The charge here was not as clear as in *Garner* and *Bruton*. See, n. 1, *supra*, and *infra* Appendix A.

3. If it be true that the grand jury testimony was merely cumulative to the other evidence in Jones, as the Court below ruled (though we disagreed at pp. 1-2 of our Reply Brief), it is true the challenged confession in *Bruton* was cumulative also, since there was eyewitness identification of Bruton by one of the victims of the crime sufficient to sustain his conviction (Bruton's petition, pp. 11, 21).

4. In the case at bar, objection was made and exception noted to the challenged instruction. In *Bruton*, no exception was taken to the instruction (Bruton's petition, p. 19).

5. In the case at bar, petitioner Jones had repeatedly requested a severance. In *Bruton*, no motion for a severance had been made (Bruton's petition, pp. 6, 18).

6. In *Garner*, his co-defendant Aiken, whose confession was clearly limited by the Court's instructions to con-

sideration against Aiken only, also appeared and testified at the trial, where he was subject to cross-examination. In the case at bar, Mittelman (Jones' co-defendant) did not appear as a witness at the trial, and could not have been the subject of cross-examination by petitioner Jones.

CONCLUSION

Petition for rehearing should be granted.

Respectfully submitted,

HERBERT MONTE LEVY,
HOFHEIMER, GARTLIR, HOFHEIMER,
GOTTLIEB & GROSS,
Attorneys for Petitioner Jones,
61 Broadway,
New York, N. Y. 10006.

Certificate of Counsel.

HERBERT MONTE LEVY, attorney of record for petitioner Paul R. Jones, hereby certifies 1) that the above petition for rehearing filed pursuant to Rule 58(2) of the Rules of this Court is presented in good faith and not for delay, and 2) that said petition is restricted to grounds confined to intervening circumstances of substantial and controlling effect, and to other substantial grounds available to petitioner Jones although not previously presented.

HERBERT MONTE LEVY.

Appendix A.

I already have instructed you that the Grand Jury testimony of each defendant was received into evidence only as to the defendant whose testimony it was and not as to the other defendant. But to be sure, I repeat: The Grand Jury testimony of Mittelman is received only as to Mittelman and not as against Jones and, similarly, the Grand Jury testimony of Jones is received only as to Jones and not as against Mittelman. You are not to consider the Grand Jury testimony of Mittelman in determining the guilt or innocence of Jones and you are not to consider the Grand Jury testimony of Jones in determining the guilt or innocence of Mittelman.

Similarly, Mittelman's affidavit is not admissible as to Jones and Jones' affidavit is not admissible as to Mittelman unless you first find that the government has established Jones' connection with Mittelman's affidavit, and Mittelman's connection with Jones' affidavit.

By this I mean the following: If you find that Mittelman, either alone or through his duly authorized attorney, knew about, secured and procured Jones' affidavit and knew of the substance of the contents of Jones' affidavit and submitted Jones' affidavit in support of Mittelman's application for a new trial, then you may decide that Mittelman is bound by Jones' affidavit and the connection would have been established if you so find.

Similarly, if Jones knew at the time he prepared and signed and swore to his affidavit, if he did swear to his affidavit, that he was submitting this affidavit for the purpose of assisting Mittelman in obtaining a new trial, and if you find or infer, an inference being evidence also, that Jones knew the reason why and the purpose for his affidavit, and if you infer and so find that Jones discussed with Mittelman or with Mittelman's duly authorized attorney his affidavit, as part and parcel of a common agreement or undertaking to secure a new trial by means of a motion for Mittelman, then you may consider, if you so find, Jones' (*sic*) affidavit with respect to Mittelman (*sic*) [GA 115a-116a].

SUPREME COURT, U. S.

NOV 1 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 223

LEO B. MITTELMAN,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEO B. MITTELMAN, *Pro Se,*
124 E. 30th Street,
New York, N. Y. 16,
MU 9-1114

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PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Leo B. Mittelman, hereby petitions for a rehearing of this Court's October 9, 1967 denial of a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, affirming his conviction for perjury in the swearing to an affidavit submitted for the purpose of obtaining a new trial.

On October 9, 1967, this Court granted review in two cases on its Miscellaneous Docket, *United States ex rel. Garner* v. *Yeager* and *Bruton* v. *United States.** In both of these cases, the constitutional question to be reviewed

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* These cases are now respectively Nos. 704 and 705; on October 9, they were respectively Nos. 66 Misc. and 109 Misc.

was essentially whether a charge to the jury, that the confession of a co-defendant could be used solely against the declarant and not against petitioner, violates due process. (This type of charge previously had been approved by this Court in *Delli Paoli* v. *United States,* 352 U. S. 232.) In the case at bar, the first paragraph of the charge to the injury (reprinted as Appendix A hereto) was totally indistinguishable from the charges to be reviewed here in *Garner* and *Bruton.* It would therefore seem that review should be granted here.

Moreover, the charge here went further. The instructions to the jury (Appendix A) while apparently protecting each defendant against admissions of the other (contained in Grand Jury testimony and affidavits), actually invited the jury to use these admissions if it found that an agreement existed to obtain a new trial for petitioner. (There was no charge of plot, scheme or conspiracy between the defendants). Thus, though the instructions in *Garner* and *Bruton* protected the petitioners there to the extent that the jury could perform the mental gymnastics (considered naive by most authorities) required by the exclusionary charge, the jury here was virtually urged to use the admissions of each against the other.

If it be argued that it was permissible to charge in the manner indicated because of joint activity on the part of petitioner and co-defendant Jones, this would not alter our argument. The question remains the same as in *Garner* and *Bruton.* In both cases the defendants acted jointly in the commission of their crimes. (As to *Garner,* see *State* v. *Sullivan,* 43 N. J. 209, 216, 221, 236; as to *Bruton* see his petition here, p. 2, noting that Bruton was tried as an accomplice with his co-defendant.)

In addition, in the instant case the evil inherent in the charge was aggravated by the fact that the joinder of these *particular* defendants in one indictment precluded

each from calling the other as a witness. (See Point IV, pages 42 et seq. in petitioner's petition for a writ herein, No. 1455, October Term 1966.)

If *Garner* and *Bruton* deserve review, the case at bar deserves review *a fortiori*—for these reasons:

1. *Garner* is a collateral attack, on a state conviction. The case at bar is a direct non-collateral attack, upon a federal conviction.

2. The charge here was not as clear as in *Garner* and *Bruton*. See, n. 1, *supra*, and *infra* Appendix A.

3. In the case at bar, objection was made and exception noted to the challenged instruction. In *Bruton*, no exception was taken to the instruction (Bruton's petition, p. 19).

4. In the case at bar, petitioner Jones had repeatedly requested a severance. In *Bruton*, no motion for a severance had been made (Bruton's petition, pp. 6, 18).

Petitioner respectfully requests that this petition be considered and weighed with the petition of Paul R. Jones heretofore filed in this Court (No. 135 [sic] October Term, 1966).

Petitioner avers that this petition is filed in good faith and not for delay. It is filed pursuant to Rule 58(2) of this Court. Said petition is restricted to grounds confined to intervening circumstances of substantial and controlling effect and other substantial grounds available to petitioner.

CONCLUSION

Petition for rehearing should be granted.

Respectfully submitted,

Leo B. Mittelman, *Pro Se*,
124 E. 30th Street,
New York, N. Y. 16

Appendix A

I already have instructed you that the Grand Jury testimony of each defendant was received into evidence only as to the defendant whose testimony it was and not as to the other defendant. But to be sure, I repeat: The Grand Jury testimony of Mittelman is received only as to Mittelman and not as against Jones and, similarly, the Grand Jury testimony of Jones is received only as to Jones and not as against Mittelman. You are not to consider the Grand Jury testimony of Mittelman in determining the guilt or innocence of Jones and you are not to consider the Grand Jury testimony of Jones in determining the guilt or innocence of Mittelman.

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By this I mean the following: If you find that Mittelman, either alone or through his duly authorized attorney, knew about, secured and procured Jones' affidavit and knew of the substance of the contents of Jones' affidavit and submitted Jones' affidavit in support of Mittelman's application for a new trial, then you may decide that Mittelman is bound by Jones' affidavit and the connection would have been established if you so find.

Similarly, if Jones knew at the time he prepared and signed and swore to his affidavit, if he did swear to his affidavit, that he was submitting this affidavit for the purpose of assisting Mittelman in obtaining a new trial, and if you find or infer, an inference being evidence also, that Jones knew the reason why and the purpose for his affidavit, and if you infer and so find that Jones discussed with Mittelman or with Mittelman's duly authorized attorney his affidavit, as part and parcel of a common agreement or undertaking to secure a new trial by means of a motion for Mittelman, then you may consider, if you so find, Jones' (*sic*) affidavit with respect to Mittelman (*sic*) [GA 115a-116a].